



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

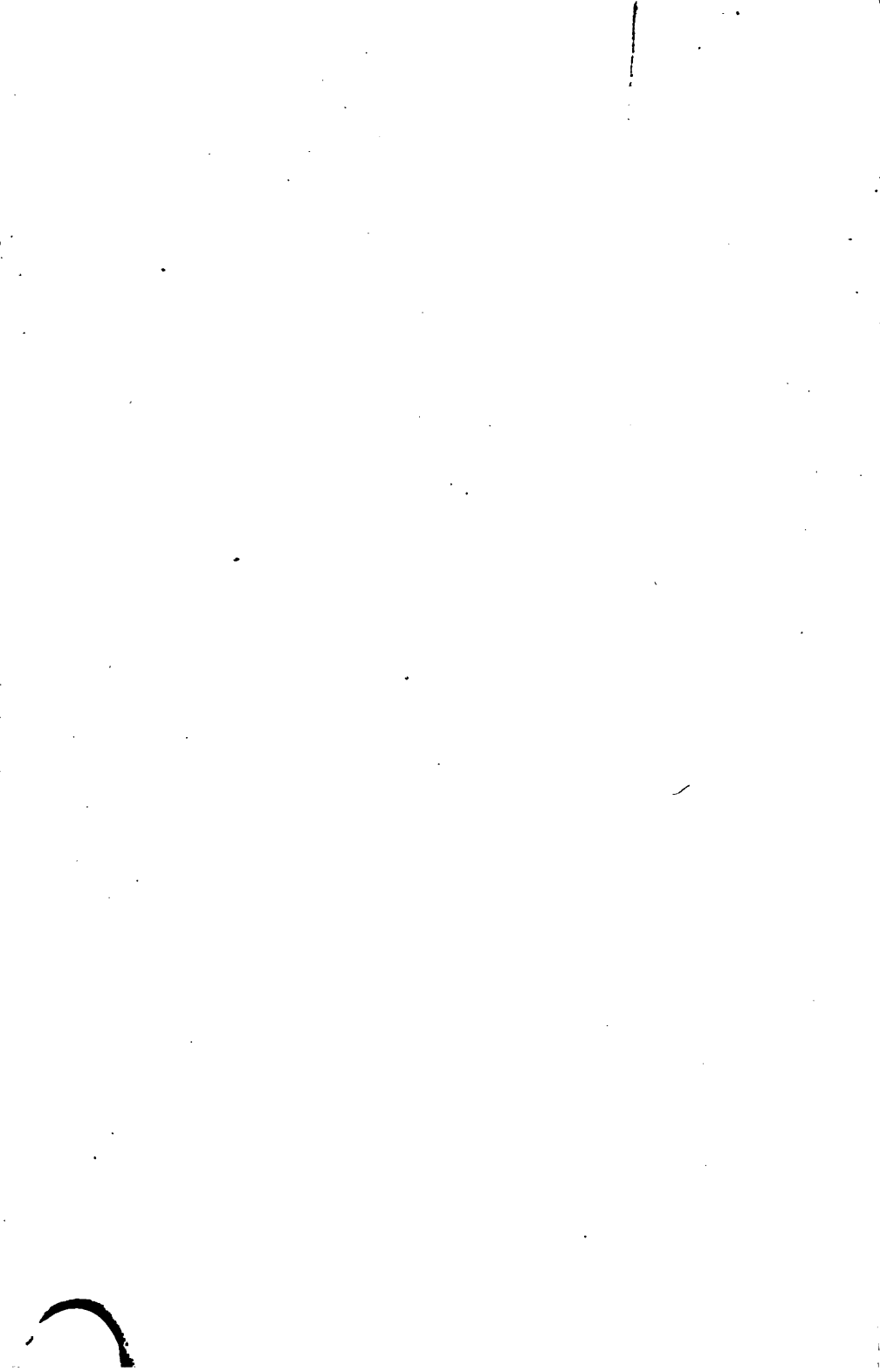
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

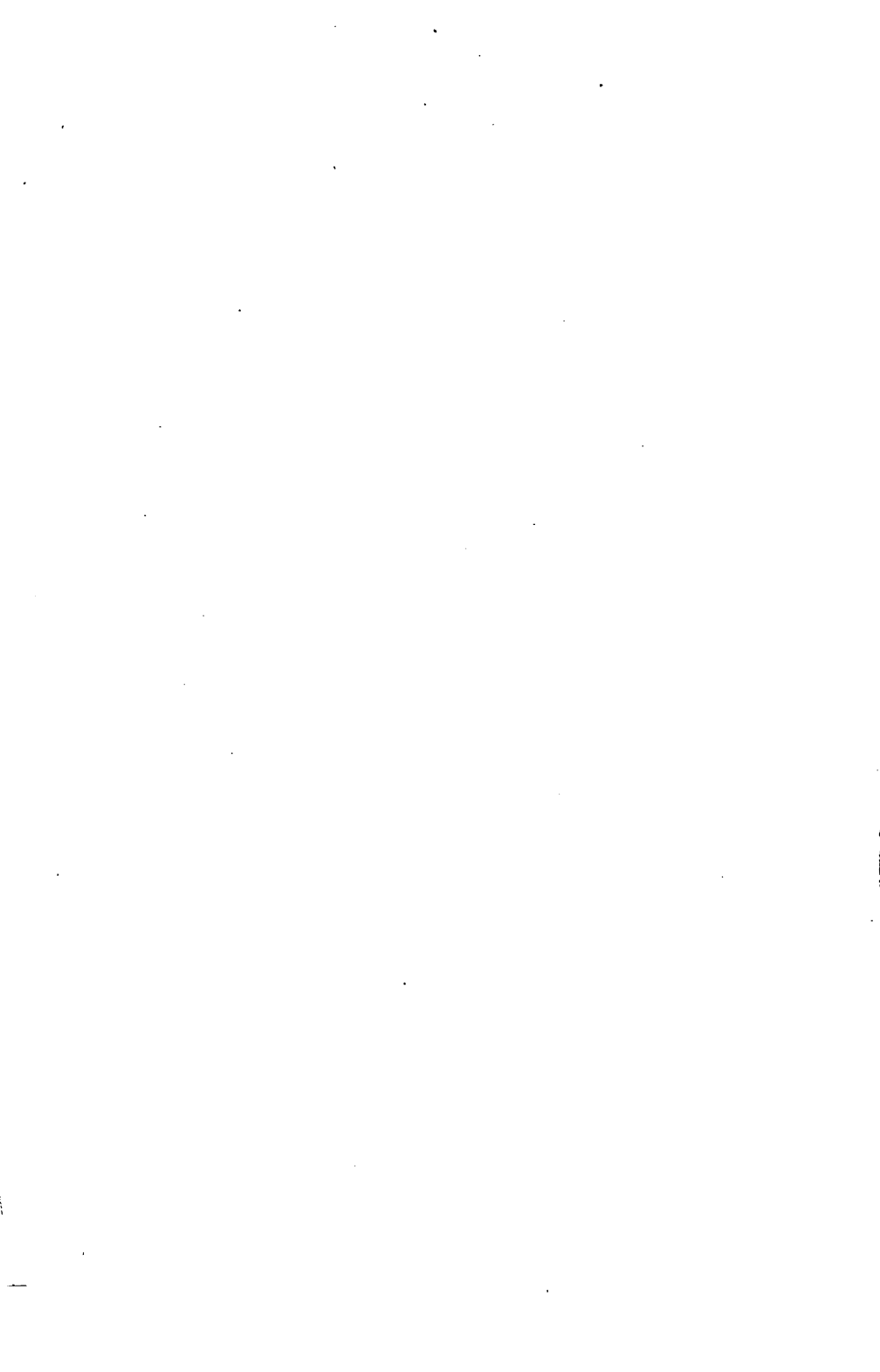






LMX
LMA
ACi2
v.2

THE INSTITUTES OF CAPE LAW



THE
INSTITUTES OF CAPE LAW

BEING
A COMPENDIUM OF THE COMMON LAW, DECIDED
CASES, AND STATUTE LAW OF THE COLONY
OF THE CAPE OF GOOD HOPE

BOOK II.
THE LAW OF THINGS.

BY
SIR A. F. S. ~~MAASDORP~~, K.T., B.A. LONDON,
Chief Justice of the Orange River Colony.



SECOND EDITION.

J. C. JUTA & CO.,
CAPETOWN. JOHANNESBURG.
PORT ELIZABETH. EAST LONDON.
GRAHAMSTOWN. STELLENBOSCH.
DURBAN (NATAL).
1907.

LONDON

PRINTED BY WILLIAM CLOWES AND SONS, Limited,

DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.

TABLE OF CONTENTS.

BOOK II.—THE LAW OF THINGS.

CHAPTER	PAGE
I. Things	1
II. <i>Jura in rem</i>	13
III. Possession	14
IV. The acquisition of possession	20
V. The effect of possession	25
VI. The loss of possession	29
VII. Ownership	33
VIII. The acquisition and extinction of ownership	36
IX. The transfer of ownership	61
X. Modes of transfer and delivery	70
XI. Other modes of acquiring ownership—prescription	80
XII. The rights of ownership	90
XIII. Water rights and rights of drainage	105
XIV. The rights of joint owners	136
XV. Land tenure in the colony—perpetual quitrent	145
XVI. Servitudes—general principles	151
XVII. Personal servitudes	155
XXVIII. Usufruct	156
XIX. The legal effect of usufruct	159
XX. The extinction of usufruct	168
XXI. <i>Usus</i> and <i>habitatio</i>	170
XXII. Prædial servitudes	171
XXIII. Urban servitudes	178
XXIV. Rural servitudes	187
XXV. The acquisition of prædial servitudes	212
XXVI. The extinction of prædial servitudes	223
XXVII. Actions connected with servitudes	229
XXVIII. Mortgage, its nature and kinds	231

TABLE OF CONTENTS.

CHAPTER	PAGE
XXIX. The constitution of conventional mortgages	241
XXX. Judicial mortgage	250
XXXI. Legal mortgages	252
XXXII. The consequences or effect of mortgage	271
XXXIII. When mortgage takes effect	282
XXXIV. The ranking of creditors	285
XXXV. The extinction of mortgages	296
XXXVI. How mortgage is enforced	309
INDEX	315

TABLE OF CASES CITED IN BOOK II.

A.

	PAGE
A. v. Eaton	52
Aberdeen Municipality v. Aberdeen Dutch Reformed Church ..	201, 215, 216
Abraham v. Isaacs & Co.	50
Adams v. De Klerk	94
Adendorp Municipality v. Kingwill	201, 202
Adolfs, N. O., v. Johannesburg Market Concession and Building Co. ..	6
Ahlbom v. Vickers	176, 189, 214
Albertyn and another v. Van der Westhuysen and others ..	276, 277, 312
Alexander v. Burger	275
Alexander v. Pfau	43
Allen, Birkett & Co., Trustees of, v. Shepstone	264
Anderson, Murison & Co. v. Colonial Government	10
Anstruther and others v. Trustees of E. L. Chiappini and A. L. Chiappini & Co.	76
Apollis v. Joram	95
Arend v. Hendrickse	264
Arendt v. Van der Vyver	204
Armstrong, <i>In re</i>	254, 255, 269
Assignees of O'Callaghan v. Cavanagh	23, 243
Assman v. Rautman	197, 199
Assue v. Curator of Assue	63, 68
Auret v. Pienaar	140
Austen Brothers v. Standard Diamond Mining Co.	130

B.

Badcock & Co. v. Skeen's Assignees	275
Baillie v. Hendricks, Hoffman and Browne	121, 122, 123
Bank of Africa v. Daniel	194
" " v. Frames	313
" " v. Harpur	248
" " v. Levin	136
Bapoo v. Mahomed	267
Barlow & Jones v. Elephant Trading Co.	2
Barnard v. Colonial Government	48, 57, 59, 60, 261, 262
Barrington and others v. Colonial Government	73

	PAGE
Barry's Trustee <i>v.</i> Hodgson	257, 270
Basson's Trustees <i>v.</i> Wiese's Trustees and others	245, 249
Baum <i>v.</i> Rode	99
Beaufort West Municipality <i>v.</i> McIntyre	95, 99
Bellingham and another <i>v.</i> Bloommetje	56, 57, 261
Beneke <i>v.</i> Van der Vijver	163
Benjamin <i>v.</i> Benjamin	238
Beukes <i>v.</i> Uys	76
Berry <i>v.</i> Divisional Council of Port Elizabeth	61, 196
Berry, <i>Ex parte</i>	78
Beyers <i>v.</i> McKenzie	63, 69
Blacker <i>v.</i> Carter	95, 99
Blake <i>v.</i> Cortis	311
Blake <i>v.</i> Goldman and others	88
Blanckenberg <i>v.</i> Colonial Government	84, 88, 89, 219
<i>"</i> , <i>In re</i>	306
Blignaut <i>v.</i> Rademeyer	139
Bloemmestein, <i>In re</i>	291, 295, 302
Blomson <i>v.</i> Boshoff	27
Board of Executors <i>v.</i> Stigling	275
Bock <i>v.</i> Schroeder and Lond	99
<i>"</i> <i>v.</i> Winder	46
Boosey <i>v.</i> Jeffreys	52
Booyesen and another <i>v.</i> Colonial Orphan Chamber and Trust Co. and others	259
Botes <i>v.</i> Meere	256
Botha <i>v.</i> Dreyer	144, 208
Botha, Smit and others <i>v.</i> Kinnear	138, 213
Bower <i>v.</i> Colonial Government	213
Braun <i>v.</i> Powrie	223
Breda <i>v.</i> Silberbauer	115
Breda and another <i>v.</i> Muller and others	93
Breda's Executor and another <i>v.</i> Mills	188
Brink, N. O., <i>v.</i> The Sheriff and others	246, 301
Brink's Curator <i>v.</i> Brink's Trustee	256, 259, 260, 304
Brink's Trustees <i>v.</i> South African Bank	248, 299
<i>"</i> , <i>"</i> <i>v.</i> Van Reenen	256, 270, 284, 305
Broadbent <i>v.</i> Ramsbottom	106
Brown <i>v.</i> Messenger of the R. M. Court, Queenstown	242, 271
<i>"</i> , <i>In re</i>	236, 279
Brown's Assignees <i>v.</i> Pote	260
Buissinne. See " <i>In re</i> Buissinne."	
Busting <i>v.</i> Kinnear	275

C.

Cairncross <i>v.</i> Nortje	4, 48, 49
Campher, <i>Re</i>	140
Campher's Curator <i>v.</i> Marnitz	140

TABLE OF CASES CITED IN BOOK II.

ix

	PAGE
Cape Commercial Bank <i>v.</i> Fleischer and Van Rensburg ..	276, 313
Cape Divisional Council <i>v.</i> Colonial Government ..	61
Cape of Good Hope Bank <i>v.</i> Fischer	247, 248
" " Mellé	309, 310
" " , Liquidators of, <i>v.</i> De Beers Mines and another	64
Cape Town and District Waterworks Co. <i>v.</i> Executors of Elders ..	10
Carter. See " <i>In re</i> Carter."	
Chapman. See " <i>Ex parte</i> Chapman."	
Chase, N. O., <i>v.</i> Du Toit's Trustees	254
Chiappini Brothers <i>v.</i> Schneider	311
Cholwich <i>v.</i> Penny	239, 273
Christie <i>v.</i> Haarhoff and others	50, 101, 220
Clarence's Trustees <i>v.</i> Clarence's Executors	256, 269
Clarke <i>v.</i> Bradfield	70
Clayton <i>v.</i> Metropolitan and Suburban Railway Co. ..	60, 76
Clair <i>v.</i> Port Elizabeth Harbour Board	94
Clingen <i>v.</i> Ross	102, 103
Cloete <i>v.</i> Ebdon	212
Coaton <i>v.</i> Alexander	68, 242, 244, 281, 307
Collins <i>v.</i> Hugo and others	6, 245
Colonial Government <i>v.</i> Breda	171
" " <i>v.</i> Fryer and Huysamen	149, 150, 253, 278
" " <i>v.</i> Gertenbach's Executors	61
" " <i>v.</i> Holt & Holt	244
" " <i>v.</i> Logan	148, 150
" " <i>v.</i> Mowbray Municipality	99, 130
" " <i>v.</i> Searight & Co.	95
" " <i>v.</i> Smith & Co.	56
" " <i>v.</i> Smith, Lawrence and Mould	261
" " <i>v.</i> Stephan Brothers	151
" " <i>v.</i> Table Bay Harbour Board <i>v.</i> Cape Town Town Council	73
" " <i>v.</i> Town Council of Cape Town	10, 44
Colonial Secretary <i>v.</i> Town Council of Grahamstown ..	99
Colonial Treasurer <i>v.</i> African Agricultural and Finance Corporation ..	310
Colquhoun & Dow <i>v.</i> Transvaal Government	78
Combrink <i>v.</i> De Kock	1
Commissioner for the Sequestrator <i>v.</i> Vos	67
Compagnie Française <i>v.</i> Cornwall	280
" " and others <i>v.</i> Kimberley Mining Board	252
Connell <i>v.</i> Factor & Lax	27
Consistory of the Dutch Reformed Church, Steytleville, <i>v.</i> Village Management Board	50
Consistory of Steytleville <i>v.</i> Bosman	212
Cooper <i>v.</i> Jordan	52
Corbridge's Trustees <i>v.</i> Haybittel, N. O.	71
Court <i>v.</i> Mosenthal & Co.	21

	PAGE
Craddock Building Society, <i>In re</i>	80
Crause v. Ryersbach	27
Crockett v. Lezard	70
Crowley v. Domony	267
Crump v. Lambert	96
D.	
Daly and Day v. Giesler	2
Daniels v. Cooper	66
Davison v. Railway Department	60
De Beer's Consolidated Mines v. Colonial Government	157
" " v. London and South African Explora- tion Co.	49, 56, 57, 58, 59, 60, 261, 262
De Hart v. De Jongh	63
De Jager v. Scheepers	88, 89
De Klerk v. Niehaus	216, 217, 218
" v. Pienaar	86
De Kock v. Le Roux	122, 125, 127
De Pass & Co. v. Rawson	94, 105
De Villiers v. Cape Divisional Council	60, 147, 148, 149
" v. Erasmus	214
" v. O'Sullivan and another	102
" v. Van Zyl	38, 94
" <i>In re</i>	253, 254
De Vos v. Colonial Government	297
De Wet v. Cloete	111
" v. Hiscock	11, 108, 109, 110, 117
" <i>Ex parte</i>	300
De Yond v. Adler	2
Dell v. Town Council of Cape Town	95, 99
Denyssen v. Botha	245
" v. McFie	268
Dewhurst v. Rintal	313
Dickson v. Stagg	143
Diering v. Furney and others	251, 272, 292
Divisional Council of Albany v. Lombard and others	203
" " Cape Division v. De Villiers	148
" " of Kimberley v. Executrix Testamentary of Sheasby	203
Dobie v. Schikerling	216
Domingo v. Colonial Government	134
Dommissie v. Theart	265, 275
Donovan v. Du Plooy	90
Dow & Co. v. Mears & Co.	124
Dr. Williams Medicine Co. v. Tothill	2
Dreyer v. Cloete	127
" v. Ireland	113, 154, 155, 173, 174, 175, 205
" v. Letterstedt's Executors	152, 176, 224
Dreyer's Trustee v. Lutley	277, 312

TABLE OF CASES CITED IN BOOK II.

xi

	PAGE
Du Plessis <i>v.</i> Van Blerk	248
„ <i>v.</i> Wilkinson	60
Du Toit <i>v.</i> De Bot and Zuidmeer	95, 97, 98
Dunell, Ebden & Co. <i>v.</i> Colonial Government	71

E.

Eagar and others <i>v.</i> Denyssen	312
East London Municipality <i>v.</i> Colonial Government	78
Eaton <i>v.</i> Registrar of Deeds	6
Eaton, N. O., <i>v.</i> Johnstone	313
Ebden <i>v.</i> Anderson	176
Edison-Bell Phonographic Co. <i>v.</i> Garlick	1
Edmeades <i>v.</i> Scheepers	223, 224
Ellman <i>v.</i> Werth	198
Elmer <i>v.</i> Warren	94
Engelbrecht and others <i>v.</i> Britz and others	153, 212
Enslin <i>v.</i> Zuidmeer	130
Equitable Fire Assurance and Trust Co. <i>v.</i> Wainwright	311
Erasmus <i>v.</i> De Wet	113
Essack <i>v.</i> Winter	220
Estate Gardiner <i>v.</i> Town Council, Port Elizabeth	194
European Diamond Mining Co. <i>v.</i> Royal Diamond Mining Co.	140
Ewers <i>v.</i> R. M. of Oudtshoorn and Trustee of Roberts	302, 303
Executors of Haupt <i>v.</i> De Villiers	27
„ of Hitge <i>v.</i> Botha	165
„ of Hofmeyr <i>v.</i> De Waal	194
„ of Meyer <i>v.</i> Gericke	54
„ „ <i>v.</i> Meyer	168
„ of Pillans <i>v.</i> Wynberg Valley Railway Co.	61
„ of Swart <i>v.</i> All and Sundry	300
„ of Schonberg <i>v.</i> Executors of Vos	304
<i>Ex parte</i> Berry	78
„ Chapman,— <i>In re</i> Geertsma	300
„ De Wet	300
„ Hollard, q.q. Brodrick	306
„ Human	300
„ Kaltwasser	300
„ Kotze	211
„ Leygonie	78
„ Levin and others	265
„ Lewis and Marks	274
„ Mabunya	310
„ Master of the Supreme Court	2, 5, 7
„ Van Reenen	300
„ Wright, Crossley & Co.	2
Exshaw & Co. <i>v.</i> Van Rhyn W. N. S. Co.	2

F.

	PAGE
Farni v. Macdonald	213, 217, 219
Fazi Booy v. Short	67
Fennon v. Boyie & Co.	71
Fivaz v. Boewell	71, 239, 242
Fleming v. Liesbeck Municipality	102, 138, 199
" v. Kietfontein Deep Gold Mining Co.	94, 102
Forth v. Grunewald	72
Francis v. Savage and Hill	233, 246, 281
Frauck v. Sachs, Ginsberg, Hoffman, and the Cape Town Town Council	185
Franken & Co. v. Pope	2
Friedlander v. Croxford and Rhodes	268
Früs v. British United Diamond Mining Co.	66
Fryer v. Farquhar's Trustee	275
Furnival v. Cornwall's Executors	160

G.

Gardiner Estate v. Town Council, Port Elizabeth	194
Gee v. Pritchard	52
Gifford v. Hare	95, 98, 99
Gillet v. Colonial Government	61
Gillingham v. Harris and Morgan	261
Glass v. Palmer and Palmer	216
Gnade v. Executors of Piton and others	259
Goate v. Bergsma	309
Goldstein v. Fry	91
Goodall v. Flower	275
Goode and Smith v. Hall	104, 136
Goosen's Trustees v. Goosen	242
Greef v. Pretorius	275
Greeff v. Keller	206
Green v. Griffiths	7
Green and Sea Point Municipality v. Egnal & Co.	94
" " v. Kramer	101
Greenshields v. Chisholm	67
Grimbeek v. Colonial Government	60
Griqualand West Board of Executors v. Green	313
" Diamond Mining Co. v. London and South African Exploration Co.	104
Guardian Assurance Co. v. High Sheriff and Insolvent Estate of Lippert	301
Guest v. Le Roex's Trustees	242, 243, 281

H.

Haarhoff v. Cape of Good Hope Bank	298
Hadley v. Leonard	90
Hall v. Claremont Municipality	134

TABLE OF CASES CITED IN BOOK II.

xiii

	PAGE
Hall v. Compagnie Française	104
„ Welkom and others	275
Hanekom's Trustee v. Kotze	77
Hansen and Schrader v. Colonial Government	77, 214
Harding v. Queenstown Municipality	122
Hare v. Trustees of Heath	246, 281, 295, 306, 307
Harris v. De Waal	99
„ v. Trustee of Buissinne	76, 77, 78, 244
Hattingh v. Robertson	93, 177
Haupt v. Clerk of the Peace, Stellenbosch	111
„ , Executors of, v. De Villiers	27
Haupt's Trustee v. Haupt & Co.	21, 276, 312
Hautpoort Mining and Estate Syndicate v. Jacobs	213
Hawkins v. Munnik	210, 223
Hay v. The African Gold Recovery Co.	1
Heidelberg Municipality v. Uys	174, 200, 201, 214
Henderson v. Waldron & Co.	268
Henderson Consolidated Corporation v. Registrar of Deeds and another	313
Henley v. Port Elizabeth Town Council	134
Herman and Canard v. Polickansky Brothers	2
Heugh's Trustee v. Heydenrich	266, 267
Heydenrich v. Fourie	243
Heydenrych v. Standard Bank	283
„ v. Trustee of Mackie, Young & Co. and the Standard Bank	281
Heynes, Matthew & Co. v. Peacock's Trustees	297
Hiddingh v. Roubaix	259, 260, 291, 295, 302
„ v. Topps	193, 194
Hirsch v. Gill	73
Hiscock v. De Wet	117
Hoets v. De Smidt	143
Hoffman, <i>In re</i>	270
Hofmeyr v. Gous	239, 243
„ v. Hofmeyr	230
„ , Executors of, v. De Waal	194
Holland v. Scott	96, 97, 98
Hollard, <i>Ex parte</i> , q.q. Brodrick	300
Hopkins, <i>In re</i>	300
Hough v. Van der Merwe	9, 119, 121, 122, 124, 126
Houghton v. Registrar of Deeds	76
Houghton Estate Gold Mining Co. v. McHattie and Barrat	162
Hudson's Trustee v. Wiley	264
Hull v. McMaster and others	255, 277, 293, 304
Human, <i>Ex parte</i>	300
Hunter's Trustees v. Colonial Government	254, 291

I.

	PAGE
<i>In re</i> Armstrong	254, 255, 269
„ Blanckenberg,—Watermeyer v. Heckroodt and Kuuhl	306
„ Bloemmestein,—Executors of Van der Poel v. Marais and others	291, 295, 302
„ Brown	236, 279
„ Buissinne,—Croeser v. Sequestrator and Attorney-General	254, 284, 291
„ „,—Van der Byl and Meyer v. Sequestrator and Attorney-General	233, 254, 284, 291, 294, 295
„ Carter,—Leibbrandt and Geyer v. Dickson and Burnies	246, 247, 249
„ Cradock Building Society	80
„ De Villiers	253, 254
„ Hoffman	270
„ Hopkins	300
„ Joosten	246, 247
„ Kotzé	246
„ „,—Low v. Trustee and Creditors of Kotzé	247, 256, 292
„ Laubscher, Widow	73, 76
„ Liesching,—Agents of Von Bihl v. President and Directors of the Lombard Bank and others	258
„ „,—Van der Riet and De Smidt v. Tennant & Co.	242
„ Lolly	254
„ Lond,—Blanckenberg v. Guardian of Lond	272
„ Long & Co.,—Ebden v. Syfret	281
„ Loudon,—Discount Bank v. Dawes	247
„ Lutgens,—Neethling, q.q., v. Trustees and Creditors of Lutgens	258, 259, 303
„ Magodas,—Leewner v. Trustee of Magodas	291, 302
„ Meiring,—Cloete v. Aling	301
„ Minnaar, Minnaar's Creditors v. Executor and Guardian of Neethling	257
„ Mostert,—Smit v. Jurgens	294
„ Pallas,—Executors of Lombard v. Registrar of Deeds	248
„ Price	275
„ Red Trading Stamp Co.	2
„ Richardson	244, 248, 280, 298
„ „,—Meinert v. Nisbet and Dickson	308
„ Roux	290
„ Russouw,—Sequestrator v. Thomson and Geyer	281, 295
„ Sandenbergh,—Matthyssen and others v. Trustees of Sandenbergh	257
„ Standen	301
„ Stilwell,—Scheuble and Van den Burg v. Durham	274, 275
„ Stoll	254, 284, 295
„ Theron,—Meyer v. Rogerson and Lorentz	309
„ Van Reenen,—Van Reenen v. Reitz and Breda	146
„ Woeke,—Cloete v. Colonial Government	251, 254, 272, 292, 293

TABLE OF CASES CITED IN BOOK II.

XV

	PAGE
<i>In re</i> Wolff	290
„ Wolff and Bartman	254, 269
„ Wools,—Roesch and Bruce <i>v.</i> Thomson, Watson & Co. ..	252
„ Wright	257

J.

Jamieson <i>v.</i> Kettles	252
Jansen <i>v.</i> Fincham	213, 214
Jansen and Horne <i>v.</i> Ysel	213, 214
Jewell and Rutter <i>v.</i> Hazel and Steer	138, 139, 264
Johannesburg Board of Executors and Trust Co. <i>v.</i> Victoria Building Co.	103
Johannesburg Municipality <i>v.</i> Transvaal Cold Storage	172
Johns <i>v.</i> Colonial Government	7
Johnson & Co. <i>v.</i> Liquidators of the Grand Hotel and Theatre Co. ..	4
Jones <i>v.</i> Petersen & Co.	2
„ <i>v.</i> Town Council of Cape Town	85, 87, 89
Joosten, <i>In re</i>	246, 247
Jordaan and others <i>v.</i> Winkelman and others	113, 117, 217
Joubert <i>v.</i> Worcester Municipality and Colonial Government ..	208, 209
Judd <i>v.</i> Fourie	77, 143, 213, 214

K.

Kannemeyer <i>v.</i> Havinga and others	140
Katzen <i>v.</i> Moore	311
Kearns <i>v.</i> Cole	243, 251, 272
Keet <i>v.</i> Dell	246, 251, 272, 281, 292
„ <i>v.</i> Zeiler and Zerwick	251, 272, 292
Kellar's Trustee <i>v.</i> Edmeades	66, 245
Kemp <i>v.</i> Roper	14, 28
„ „ <i>Re</i>	300
„ „ Uppleby & Co.	1
Keyter <i>v.</i> Barry's Executor	67
Kilgour <i>v.</i> Creditors of Lisbon-Berlin Goldfields	269
Kimberley Divisional Council <i>v.</i> London and South African Explora- tion Co.	60, 77, 148, 149
Kimberley Mining Board <i>v.</i> Stanford	153, 191, 210
Kimberley Mutual Building Society <i>v.</i> Lewis and others	4
Kimberley Public Gardens, Trustees of, <i>v.</i> Colonial Government ..	60
Kimberley Town Council <i>v.</i> Mathieson	134
„ „ <i>v.</i> Murtha	134
„ „ <i>v.</i> Van Beek	134
Kirstein <i>v.</i> Nellmapius	63, 70
Kitchen <i>v.</i> Ströbel	63, 65
Kitshoff <i>v.</i> Daly's Trustees and others	307
Klendgen & Co. <i>v.</i> Trustees of Rabie	76
Klipplaats Woolwashing Co. <i>v.</i> J. B. Leach	27, 28

	PAGE
Klopper <i>v.</i> Smit	35
Koch and Dixie <i>v.</i> Avenarius and another	2
Kock <i>v.</i> Divisional Council of the Cape	195
„ <i>v.</i> Theron	110
Kohler and others <i>v.</i> Baartman	108
Kohne <i>v.</i> Harris	94, 130
Kotze, <i>Ex parte</i>	214
Kotze. See “ <i>In re</i> Kotze.”	
Kotze <i>v.</i> Prins	63
Krachmal's Trustees and Cape Town Town Council <i>v.</i> Epstein	254
Kriege <i>v.</i> Trustees of the South African Bank and others	65
Krige <i>v.</i> Wilson	153
Kuils River Public School Committee, Petition of	62

L.

Landman <i>v.</i> Daverin	210, 211
Landmark <i>v.</i> Van der Walt	60, 195
Lange and others <i>v.</i> Liesching and others	61, 279
Langley <i>v.</i> Muller	40
Lasker <i>v.</i> Crapper	186
Laubscher <i>v.</i> Reeve and others	188, 211
„ <i>, In re</i> Widow	73, 76
Lawson <i>v.</i> Stevens	264
Lazarus <i>v.</i> Dose	266, 267
La Riche <i>v.</i> Van der Heuvel	71
Le Roex <i>v.</i> De Villiers	248
Le Roux and others <i>v.</i> Lœwenthal	155
„ <i>v.</i> Malherbe	143
Leal & Co. <i>v.</i> Williams	64
Lean's Trustee <i>v.</i> Cerruti	70
Legg, <i>Ex parte</i>	2
„ <i>v.</i> Finlay	2
Lentsky <i>v.</i> Surveyor-General	88
Lever Brothers <i>v.</i> Nannueei	2
Levin and others, <i>Ex parte</i>	265
Lewis <i>v.</i> Holt and Holt	2
„ <i>v.</i> Lazarus	2
„ and Marks, <i>Ex parte</i>	274
Leygonie, <i>Ex parte</i>	78
Liesching, <i>In re</i>	242, 258
„ , Executor of Fichat, <i>v.</i> Colonial Government	150
Lind <i>v.</i> Gibbs and Cooper	202, 217
Lind and others <i>v.</i> Calitz and others	56, 58
Liquidators of Cape of Good Hope Bank <i>v.</i> De Beers Mines and another	64
Logan <i>v.</i> Colonial Government	61, 150
Lolly, <i>In re</i>	254

TABLE OF CASES CITED IN BOOK II.

xvii

	PAGE
Lombard Bank <i>v.</i> Hammes	245
„ „ <i>v.</i> Storm	144
Lond, <i>In re</i>	272
London and South African Exploration Co. <i>v.</i> Abraham and others ..	266
„ „ „ „ <i>v.</i> Bultfontein Mining Board and others ..	157, 192
„ „ „ „ <i>v.</i> Divisional Council of Kim- berley and Mylchreest ..	195
„ „ „ „ <i>v.</i> Howe & Co.	93
„ „ „ „ <i>v.</i> Kimberley Town Council ..	199
„ „ „ „ <i>v.</i> Mylchreest	275
„ „ „ „ <i>v.</i> Rouliot	95, 102, 103, 104, 153, 157
Long <i>v.</i> Randall	72
Long & Co., <i>In re</i>	281
Longlands <i>v.</i> Francken	266
Loots <i>v.</i> Van Wyk	27, 28
Lord Percival <i>v.</i> Phipps	52
Loudon, <i>In re</i>	247
Lourens <i>v.</i> Du Toit	272
Louw <i>v.</i> Andrews	243
„ <i>v.</i> De Villiers	152, 173, 177
„ <i>v.</i> Registrar of Deeds	300
„ <i>v.</i> Watermeyer	50
Loxton <i>v.</i> Staples	224
Lucas' Trustee <i>v.</i> Ismail and Amod	68, 73, 77
Ludolph and others <i>v.</i> Wegner and others ..	129, 130, 131, 132, 198, 199, 220
Lyons <i>v.</i> Fishmongers Co.	119
„ „ Trustees of, <i>v.</i> Exploration Co. ..	262

M.

Mabunya, <i>Ex parte</i>	310
Macdonald <i>v.</i> District Engineer of the Midland and North Eastern Railway	60
Mackay Brothers <i>v.</i> Cohen	267
Magodas, <i>In re</i>	291, 302
Mangold Brothers <i>v.</i> Eskell	251, 272, 273, 281, 292, 307, 308
Manuel <i>v.</i> Cape Town Town Council	134
Marais <i>v.</i> Eloff	102
Marks <i>v.</i> Mosenthal & Co.	2
Martell & Co. <i>v.</i> Paarl Berg Wine, Brandy, and Spirit Co.	2
Martin <i>v.</i> McElvey and Savory	63
Master <i>v.</i> Churchwardens of the Roman Catholic Chapel and others ..	270
Master of the Supreme Court, <i>Ex parte</i>	2, 4, 5
Maynard <i>v.</i> Usher	7
McFarland <i>v.</i> De Beer's Mining Co.	104
McGregor <i>v.</i> Divisional Council of Clanwilliam	128

	PAGE
McLoughlin v. Delahunt	27, 28
McMaster v. Registrar of Deeds	300
Meintjes v. Oberholzer and others	153, 202, 204
Meintjes and Dixon v. Harbin	302
Meiring, <i>In re</i>	301
Melck, Executors of Burger, v. David and others	78
Meyer v. Botha and Hergenröder	244, 251, 272, 281, 307
„ v. Johannesburg Waterworks Estate and Exploration Co.	106, 107, 115, 116, 118, 119, 121, 122, 124
Meyer, Executors of, v. Gericke	54
„ „ „ v. Meyer	168
„ „ Executrix of Smuts, v. Meyer	177
Michel v. De Villiers	299
Mills v. Salmond	2
Mills and Sons v. Trustees of Benjamin Brothers	24, 25, 70
Minnaar, <i>In re</i>	257
Minors Botes v. Trustees of Meere	256
Mission Trading Co. v. Hessel	195
Molle v. Executors of Van der Berg	236
Moller v. Natal Bank	251, 272, 292
Momsen v. Mostert	266
Montorio, <i>Ex parte</i>	6
Moore v. Van Schoor	251
Moravian Mission v. Mona and others	78
Mostert, <i>In re</i>	294
Mostert's Trustees v. Mostert	253, 255
Mouton v. Van der Merwe	117
Mshwakezele v. Guduza	43
Mulder v. Creditors of Lacable	269
Muller v. Chadwick & Co.	63, 64
Municipality of Frenchhoek v. Hugo	88, 108, 117, 219
„ of Green Point v. Powell's Trustee	254
„ of Swellendam v. Surveyor-General	200, 202, 219
Murphy v. Murphy	3
Murtha v. Kimberley Town Council	134
„ v. Von Beek	104
„ „ Trustee of, v. Coghlan	264
Mutual Life Assurance Co. v. Hudson's Trustee	294
Myburgh v. Jamison	50, 101, 184, 220
„ v. Van der Byl	108, 144
Myers Brothers v. Morgan and Another	64

N.

Natal Bank v. Martinis & Co.	251, 273, 292
Naudé v. Naudé's Trustee	256, 295, 304
Ncotama v. N'Cume	27
Ncumata v. Matwa	43
Ncume v. Kula	27

TABLE OF CASES CITED IN BOOK II.

xix

	PAGE
Neid and others <i>v.</i> Crozier and others	270
Nel <i>v.</i> Du Toit	208
Nelson and Meurant <i>v.</i> Quin & Co.	51
Netherlands Bank <i>v.</i> Reserve Investment Co.	311, 313
Newdigate <i>v.</i> Registrar of Deeds	5, 300
Niekerk <i>v.</i> Wakefield	198
Nieuwoudt <i>v.</i> Slavin and Jowell	8
Nino Bonino <i>v.</i> De Lange	27
Noble <i>v.</i> Heatley	266
Norden <i>v.</i> Solomon, q.q.	249, 270
„, „, Trustee of Smith, <i>v.</i> Norden	77
Nyobo and others <i>v.</i> Ndaba and others	78

O.

Oberholster <i>v.</i> Holtman	234, 239
O'Callaghan, Assignees of, <i>v.</i> Cavanagh	23, 243
Ogilvie and Mandy <i>v.</i> Rorke	244
Ohlsson's Cape Breweries <i>v.</i> Whitehead	193, 194
Olivier <i>v.</i> Fourie	119, 125, 126
Oosthuysen <i>v.</i> Estate of Oosthuysen	14
„, „, <i>v.</i> Muller	137
„, „, <i>v.</i> Plessis and others	137, 139, 141, 143
Oosthuysen's Tutrix <i>v.</i> Moffat and another	259, 260, 279, 307
O'Reilley <i>v.</i> Lücke	48, 173, 179
Orsmond's Trustees <i>v.</i> Hofmeyer	310
Orson <i>v.</i> Reynolds	24, 70
O'Shea <i>v.</i> Port Elizabeth Town Council	134

P.

Pallas, <i>In re</i>	248
Parkin <i>v.</i> Parkin	56, 141, 261
„, „, <i>v.</i> Spies	311
„, „, Titterton	213
Parkin and others <i>v.</i> Lippert and others	165
Pasquali & Co. <i>v.</i> Diaconicolas and Capsopolus	2
Paterson's Marriage Settlement Trustees <i>v.</i> Paterson's Trustees in Insolvency	285
Payn <i>v.</i> Yates	242
Peach & Co. <i>v.</i> Simon's Trustee	280
Peacocke <i>v.</i> Hodges	153, 192, 199
Peak, Frean & Co. <i>v.</i> Carr & Co.	2
Peddle <i>v.</i> Cohen	65
Pentz <i>v.</i> Colonial Government	29
Percival, Lord, <i>v.</i> Phipps	50
Perrin <i>v.</i> Turton	63
Petition of Kuils River Public School Committee	62
Philip Brothers <i>v.</i> Wetzlar	91
Phillips and King <i>v.</i> Trustees of Norton	239, 245

	PAGE
Pienaar <i>v.</i> Van Zyl	214
Pieterse <i>v.</i> Estate of Gabrielse	189
Pike <i>v.</i> Hamilton, Ross & Co.	50, 100, 183, 185, 186, 187, 220
Pillans, Executors of, <i>v.</i> Wynberg Valley Railway Co.	61
Pinkers <i>v.</i> Fenster	70
Pinn <i>v.</i> Elliott	274
Pope <i>v.</i> Curl	52
Port Alfred Landing and Shipping Co. <i>v.</i> Bonneville	6
Porter <i>v.</i> Phillip	193, 192
Preston and Dixon <i>v.</i> Biden's Trustee	6, 65, 68, 157
Price, <i>In re</i>	275
Price's Patent Candle Co. <i>v.</i> Everitt & Co.	2

Q.

Q. <i>v.</i> Adams	219
Queen <i>v.</i> Schultz	216
Queenstown Assurance Co. <i>v.</i> Wood's Trustee and others	263
Quin <i>v.</i> Mego	251, 273, 292

R.

<i>Re</i> Campher	140
„ Estate of Eaton Goodson and another <i>v.</i> Bathgate	313
„ Kemp	300
Red Trading Stamp Co., <i>In re</i>	2
Redelinghuys and others <i>v.</i> Silberbauer	96
„ „ <i>v.</i> Watermeyer	256, 270
Reed <i>v.</i> Buckley	274
„ <i>v.</i> De Beer's Consolidated Mines	94, 105, 136
„ <i>v.</i> Lee	251, 272, 292
Reed's Trustee <i>v.</i> Reed	276, 277, 313
Rees <i>v.</i> Jackson and Blyth	63
Reid <i>v.</i> Gumenke	27
Reiners, Von Laer & Co. <i>v.</i> Fehr	2
Rens <i>v.</i> Bam's Trustee	72
Retief <i>v.</i> Hamerslach	65, 286
„ <i>v.</i> Louw 9, 12, 92, 100, 108, 110, 112, 119, 120, 121, 122, 127, 130, 152, 153, 173, 176, 226	
Reynolds <i>v.</i> Orson	27
Richards <i>v.</i> Attorney-General	29
„ <i>v.</i> Clarke	265
„ <i>v.</i> Nash	214
Richardson. See " <i>In re</i> Richardson."	
Rimer <i>v.</i> White	311
Robertson <i>v.</i> The Sequestrator	70
Roodt <i>v.</i> Registrar of Deeds	300
Rooth & Wessels <i>v.</i> Benjamin's Trustee and the Natal Bank	247, 301
Ross and another <i>v.</i> Hite's Executor	193

	PAGE
Rossouw v. Burgers and others	216, 219
Roux, <i>In re</i>	290
Royal Baking Powder Co. v. Young and Son	2
Rupert's Trustee v. Rupert	255
Russouw, <i>In re</i>	281, 295
Rutter v. Ashenden	1

S.

Saazman v. Le Grange	78
Sadie v. Standard Bank	91
Salie and another v. Abrahams	78
Salmon v. Lamb's Executor and Naidoo	215, 226
Sandenbergh, <i>In re</i>	257
Saunders v. Executors of Hunt	230
Scallen v. Gnodde	61
Scheepers v. Vigors	266
Schoenland and Franck v. Aurret & Co.	294
Scholtz v. Registrar of Deeds	300
Schonnberg, Executors of, v. Executors of Vos	304
Schoof v. Weyers	219
Searight v. Cape Town Town Council	134
Sheba Gold Mining Co. v. Vautin, Millbourne and Steers	40
Shepherd v. McLagan	260, 270
Siffmann v. Deputy Sheriff of Heidelberg	70
Silberbauer and Breda v. The Cape Town Municipality	113, 115, 116
Singleton, in the matter of the Black Swan, <i>Ex parte</i> Smith	249, 268
Sitsitsha v. Fana	27
Slabber v. Bell	60, 150
Smith v. Dierks	268
„ v. Farrelly's Trustee	243, 272
„ v. Randall's Trustees	246
Smith and another v. Sharenovitz	91
Smith and others v. Martin's Executors	83, 85
Smuts v. Cathcart Divisional Council	254
„ v. Executors of Haupt	311
„ v. Stack and others	242, 281
Snyman v. Schenke	195
Somerwell Brothers v. Cuthbert & Co.	2
South African Association v. Roberts	313
„ „ „ v. Van Staden	57, 58, 89, 308
South African Loan, Mortgage and Mercantile Agency v. Cape of Good Hope Bank	246, 247, 249
Southall & Co. v. Cuthbert & Co.	2
Southey v. Borchers	311
„ v. Schoombie	12, 108, 113, 215, 217
„ v. Southey	106, 109
Spangenberg's Trustee v. Cousins	26'

	PAGE
St. Helen's Smelting Co. v. Tipping	97
St. Leger v. Town Council of Cape Town	183
Standard and Digger's News Printing and Publishing Co. v. Ester- huizen	266, 267
Standard Bank v. Wentzel and Lombard	280
Standen, <i>In re</i>	291
Steele v. Thompson	214
Steffens v. Bain	213
Stellenbosch Divisional Council v. Myburgh	150
Sterner v. Morom	260
Stewart & Co. v. The Master	3
Stewart's Trustees and Marnitz v. Uniondale Municipality	276, 312
Steyn v. Zeeman	92, 153, 207
Steytlerville. See "Consistory of the Dutch Reformed Church, Steytlerville, v. Village Management Board," and "Consistory of Steytlerville v. Bosman."	
Stilwell, <i>In re</i>	274, 275
Stimie v. Du Preez	222
Stoll, <i>In re</i>	254, 284, 295
Stratford's Trustee v. London and South African Bank	242, 244
Struben v. Collet	124, 125
Struben and others v. The Cape Town District Waterworks Co.	107, 117, 118, 125, 126
Strydom v. Tiran	143
Stupart v. Cross	49
Sullivan v. Sutton	265, 274
Sutherland v. Elliott Brothers	299
Swanepoel v. Van der Hoeven	27, 28
Swart v. Taljaard	137
„ , Executors of, v. All and Sundry	290
Swarts v. Landmark	6, 177

T.

Table Bay Harbour Board v. Deputy Sheriff	252, 263
Tarkastad Dutch Reformed Church v. Tarkastad Municipality	203
Theron, <i>In re</i>	309
Thomas v. Barker	264
Thompson v. Stanhope	52
Thorpe's Executor v. Thorpe's Tutor	264
Tiffin v. Harsant	290
Town Council, Cape Town, v. Commissioner of Crown Lands	60, 61
„ „ „ v. Table Bay Harbour Board	61
Treasurer-General v. Bosman's Trustees	253, 254
Tredgold's Executors v. Colonial Orphan Chamber	294
Trill and others v. Claremont Municipality	99, 130
Tritsch, Trustees of, v. Berrange and Son	245, 263

TABLE OF CASES CITED IN BOOK II.

xxiii

	PAGE
Trustee of Kimberley Public Gardens <i>v.</i> Colonial Government	60
„ of Murtha <i>v.</i> Coghlan	264
„ of Walker <i>v.</i> Jones, Cosnett and Ball	265
Trustees of Allen, Birkett & Co. <i>v.</i> Shepstone	264
„ of Brink <i>v.</i> Mechan and others	6
„ of Clarence <i>v.</i> Executors of Clarence	256, 270
„ of Lyons <i>v.</i> Exploration Co.	262
„ of Tritsch <i>v.</i> Berrangé and Son	245, 263
„ of Western Province Bank <i>v.</i> Horak's Trustees	281
„ of Wiarda <i>v.</i> Gumpert	70
Truter <i>v.</i> Joubert's Trustee	70

U.

Ulrich <i>v.</i> Ulrich's Trustee	266, 267
United South African Association <i>v.</i> Cohn	65

V.

Van Blommestein <i>v.</i> Holliday	65
Van de Venter <i>v.</i> Moss and Webb	244
Van der Byl <i>v.</i> Hanbury	80
„ <i>v.</i> Myburgh	109, 174, 207
Van der Merwe <i>v.</i> Rex	67
„ „ <i>v.</i> Webb	63, 65, 286
Van der Spuy <i>v.</i> Maddison	73
Van der Waldt <i>v.</i> Hartman and others	143
Van der Westhuysen <i>v.</i> Smith and others	93
Van Heerden <i>v.</i> Wiese	11, 108, 110, 118
Van Niekerk <i>v.</i> Blake	177
„ <i>v.</i> Wimble	202
Van Reenen, <i>Ex parte</i>	300
„ <i>In re</i>	146
Van Rooyen <i>v.</i> McColl and others	236, 260
Van Schalkwyk <i>v.</i> Du Plessis and others	192
„ <i>v.</i> Hauman	125, 126
„ <i>v.</i> Hugo and another	86
„ <i>v.</i> Pienaar	248, 256
Van Wyk <i>v.</i> Van Wyk	143
Van Wyk's Trustee <i>v.</i> Van Wyk and another	313
Venter <i>v.</i> Green and another	77
Vermaak <i>v.</i> Palmer	107, 109, 116, 117
Verwey, N. O., <i>v.</i> Malcomess & Co.	71
Victoria Diamond Mining Co. <i>v.</i> De Beer's Mining Co.	130
Viljoen and others <i>v.</i> Hamman and another	208
Villagers of Bredasdorp <i>v.</i> Churchwardens of Bredasdorp	201
Visser <i>v.</i> Du Toit	73, 75
Vorster <i>v.</i> Hodgson	90

W.

	PAGE
Wallace <i>v.</i> Randall	149, 195
Walker, Trustee of, <i>v.</i> Jones, Cosnett and Ball	256
Walker & Co. <i>v.</i> Durrant and Co. and another	263
Walter <i>v.</i> Self	95
Warner's Trustee <i>v.</i> Wicht	291
Watson <i>v.</i> Fraetas	159
„ <i>v.</i> Geard	95, 96
Webb <i>v.</i> Giddy	102, 149
Weilbach <i>v.</i> Diedrickse	214
Weintroub and another <i>v.</i> Steer	209
Western Province Bank, Trustees of, <i>v.</i> Horak's Trustees	272
Whinney, N. O., <i>v.</i> Gardner, N. O.	249, 309, 310
White <i>v.</i> Adams	157
White and Tucker <i>v.</i> Rudolph	27, 28
Wiarda, Trustees of, <i>v.</i> Gumpert	70
Wiber <i>v.</i> Mohodini	313
Wiener <i>v.</i> Van der Byl	184
Williams <i>v.</i> Williams	236
Williams Medicine Co. <i>v.</i> Tothill	2
Willson <i>v.</i> Webster	67
Wilson and Hall <i>v.</i> Wessels	76, 90
Woeke, <i>In re</i>	251, 254, 272, 292, 293
Wolff, <i>In re</i>	290
Wolvaards <i>v.</i> Pienaar	207
Woodhead, Plant & Co. <i>v.</i> Gunn	63, 64, 65, 286
Woodrow & Co. <i>v.</i> Rothman	266
Woolf <i>v.</i> Bartman, <i>In re</i>	254, 269
Wools, <i>In re</i>	252
Wordon and Pegram <i>v.</i> Cantrell and Cochrane and the Registrar of Deeds	2
Wright <i>v.</i> Arkson	37
„ <i>v.</i> Paterson	102
Wright, <i>In re</i>	257
Wright, Crossley & Co. <i>v.</i> Dobbin & Co.	2
„ „ <i>v.</i> Royal Baking Powder Co.	2
„ „ <i>v.</i> Royal Baking Powder Co. of New York	2
„ „ <i>Ex parte</i>	2
Wynberg Valley Railway Co. <i>v.</i> Eksteen	61

Y.

York <i>v.</i> Van der Lingen	65
---------------------------------------	----

Z.

Zeederberg <i>v.</i> Trustees of J. Norton & Co. and others	236, 237
---	----------

LIST OF ABBREVIATIONS.



Buch. . . .	Buchanan's Supreme Court Reports.
Buch. App. C. . .	Buchanan's Reports of the Appeal Court Cases.
C.	Justinian's Code.
Cape Times . . .	The Cape Times Reports.
Const.	Justinian's Constitutions.
D.	Justinian's Digest.
E. D. C.	Reports of the Eastern Districts Court.
Foord.	Foord's Supreme Court Reports.
G.	Grotius' Introduction to Dutch Jurisprudence.
Gregorowski . .	Reports of the High Court of the Orange Free State by Gregorowski.
Groen.	Groenewegen's footnotes to Grotius' Introduction to Dutch Jurisprudence.
Groen., De Leg.	Groenewegen's De Legibus Abrogatis.
H. C.	Reports of the High Court of Griqualand West.
Hertzog. . . .	Reports of the High Court of the South African Republic for 1893. Translated by Leonard and Kotze.
Kotze	Chief Justice Kotze's Reports of the High Court of the Transvaal Province from 1877 to 1881.
Lybrecht	Lybrecht's Redenerend Verhoog over't Notaris Ampt.
Menzies	Menzies' Reports of the Supreme Court.
N. L. R.	Natal Law Reports.
Novel.	Justinian's Novels.
Off. Rapp. . . .	Official Reports of the High Court of the South African Republic from 1894 to 1897, in the Dutch original.
Off. Rep.	Official Reports of the High Court of the South African Republic, from 1894 to 1897, translated into English.
R. Obs.	Rechtsgeleerde Observation.
Roscoe	Roscoe's Reports of the Supreme Court.
S. Af. Rep. . . .	Reports of the High Court of the South African Republic. Vol. i., from 1881 to 1884, by Chief Justice Kotze ; vol. ii., from 1885 to 1888, by Kotze and Barber.
S. C.	Reports of the Supreme Court by Juta and others.

- Schorer . . . Schorer's Notes to Grotius' Introduction to Dutch Jurisprudence, to be found in the Appendix to Maasdorp's Translation of that work.
- Searle. . . . Searle's Reports of the Supreme Court.
- T. S. . . . Reports of the Supreme Court of the Transvaal.
- V. D. K. . . . Van der Keessel's Selected Theses.
- V. D. L. . . . Henry's Translation of Van der Linden's Institutes of the Laws of Holland.
- V. L. . . . Van Leeuwen's Roman Dutch Law, translated by Chief Justice Kotze.
- V. L., C. F. . . Van Leeuwen's Censura Forensis.
- Voet. . . . Voet's Commentarius ad Pandectas.
- Watermeyer . . Watermeyer's Supreme Court Reports for 1857.

N.B.—When Book III. of this work is referred to in this volume, it is the first edition of that Book which is meant.

THE INSTITUTES OF CAPE LAW.

BOOK II.—THE LAW OF THINGS.

CHAPTER I.

THINGS.

THE term thing (*res*) is applied in law to everything which can be the object of a right, that is, everything with respect to which one person may be entitled to a right and another person subject to a duty.¹

Things may be classified in one or other of two ways, namely, either absolutely according to their nature, or relatively to persons, that is, according as they are or are not the objects of ownership.²

In their nature things are either *corporeal* or real things, on the one hand that is, material objects which are perceptible to sight and touch, such as a house, a field, a horse, etc.,³ or *incorporeal*, that is, artificial, or fictitious things, such as servitudes, inheritances, debts, rights of action, copyrights, patents, rights to trade-marks, etc.,⁴ which are not either visible or

¹ G. 2: 1: 3.

² G. 2: 1: 4.

³ G. 2: 1: 10.

⁴ As the subject of copyrights, patents, and trade-marks falls rather outside the scope of this work, the reader is referred for information thereon to the following statutes and decisions:—

Copyright: Act 2, 1875; Act 4, 1888; Act 18, 1895; Act 46, 1905.

Patents: Act 17, 1860. See also Act 28, 1904; *Hay v. The African Gold Recovery Co.*, 2 Off. Rep. 158; 3 Off. Rep. 244; *Rutter v. Ashenden*, 22 S. C. 246; *Kemp v. Uppleby & Co.*, 5 Searle, 86; *Edison-Bell Phonographic Co. v. Garlick*, 16 S. C. 543; *De Beers Consolidated Mines v. Ettling*, (1906) T. S. 418.

Trade-marks: Act 22, 1877; Act 12, 1888; Act 12, 1895. *Combrink*

tangible,⁵ but consist of rights or groups or aggregates of rights and material objects (*universitates rerum*), which are treated by the law as though they were real things,⁶ in the same way as fictitious persons are regarded in law, for certain purposes, as though they were real or natural persons.

A more important division of things, from a practical point of view, is into things *movable* and things *immovable*,⁷ under one or other of which classes all property, corporeal as well as incorporeal, will for legal purposes have to be ranked.^{7a} This division of things is of the utmost importance, inasmuch as the law with respect to movables and immovables respectively varies in many particulars, and more especially as regards the modes of acquiring ownership in and the vesting of real rights to them.⁸ As a matter of private international law, for instance, it may be laid down

v. De Kock, 5 S. C. 408; *Mills v. Salmond*, 4 Searle, 230; *Reiners, Von Laer & Co. v. Fehr*, 2 Cape Times, 135; *Lewis v. Holt & Holt*, 11 S. C. 209; *Franken & Co. v. Pope*, 11 S. C. 209; *Price's Patent Candle Co. v. Everitt & Co.*, 11 S. C. 213; *Somerwell Brothers v. Cuthbert & Co.*, 12 S. C. 252; *Martell & Co.*, *v. Paarl Berg Wine, Brandy, and Spirit Co.*, 12 S. C. 326; *Lewis v. Lazarus*, 13 S. C. 420; *Wright, Crossley & Co. v. Royal Baking Powder Co.*, 7 Cape Times, 405; *Ex parte Wright, Crossley & Co.*, L. R., Ch. Div., April 9, 1897; *Wright, Crossley & Co. v. Dobbin & Co.*, Irish Q. B., Nov. 24, 1897; *Royal Baking Powder Co. v. Young & Son*, Irish Ch. Div., Nov. 24, 1897; *Wright, Crossley & Co. v. Royal Baking Powder Co.*, of New York, 14 S. C. 366; 15 S. C. 9; *Peak, Frean & Co. v. Carr & Co.*, 15 S. C. 172; *Koch & Dixie v. Avenarius and another*, 15 S. C. 200; *Daly & Day v. Giesler*, 16 S. C. 238; *Lever Brothers v. Nannucci*, 17 S. C. 507;

Ex parte Legg, 18 S. A. L. J. 193; *Legg v. Finlay*, 18 S. C. 107; *Wordon & Pegram v. Cantrell & Cochrane and the Registrar of Deeds*, 18 S. C. 142; *De Yond v. Adler*, 19 S. C. 1; *Southall & Co. v. Cuthbert & Co.*, 19 S. C. 453; *Exshaw & Co. v. Van Rhyn W. & S. Co.*, 21 S. C. 267; *Jones v. Petersen & Co.*, 20 S. C. 399; *Dr. William's Medicine Co. v. Tothill*, 20 S. C. 483; *Herman & Canard v. Policansky Brothers*, 22 S. C. 151; *Pasquali & Co. v. Diaconicolos & Capsopolus*, (1905) T. S. 472; *Barlow & Jones v. Elephant Trading Co.*, (1905) T. S. 637; *In re the Red Trading Stamp Co.*, 22 S. C. 417; *Marks v. Mosenthal & Co.*, (1906) T. S. 421.

⁵ Voet, 1: 8: 11, 18; G. 2: 1: 14; Schorer, Note 55.

⁶ G. 2: 1: 7.

⁷ Voet, 1: 8: 11, 18.

^{7a} *Ex parte Master of the Supreme Court*, (1906) T. S. 566.

⁸ Voet, 1: 8: 30.

generally that movables, wherever they may actually be at any particular time, are always regarded in law as being situate where the owner has his domicile at the time when any conflict of rights with respect to them arises or any transaction with regard to them takes place; whilst immovable property is always considered as being where it is actually situate.⁹ Hence the right to immovable property is regulated by the law and subject to the jurisdiction of the Courts of the place where it is situate, and that to movables by the law of the domicile of the owner.¹⁰

Immovable things are land and whatever is either naturally or artificially attached to the land and therefore regarded in law as a part of or an accession to the land.¹¹ Thus growing trees, hanging fruit, and standing crops, whilst they are still attached to the land, are regarded as immovable property, and so also are minerals and metals, whilst still forming part of the ground; but as soon as they are cut down or detached from the ground they become movable.¹² Building materials, again, though in themselves movable, if they are permanently built into a house or fastened to immovable property, become a part of it, and are regarded as immovable property.¹³ In the same way buildings and houses become part and parcel of the land upon which they are erected, and are considered immovable property,¹⁴ of whatever materials they may be constructed, provided they are firmly attached to the ground. But whether a building is to be regarded as movable or immovable will depend upon the

⁹ Voet, 1 : 8 : 30; *Stewart & Co. v. The Master*, 22 S. C. 259.

¹⁰ *Murphy v. Murphy*, (1902) T. S. 179. Voet, 1 : 8 : 30, and also 38 : 17, Summary, sec. 34; Schorer, Note 55.

¹¹ Voet, 1 : 8 : 11; G. 2 : 1 : 13; Schorer, Note 54; V. L., vol. 1, p. 145.

¹² Voet, 1 : 8 : 13.

¹³ Voet, 1 : 8 : 14; G. 2 : 1 : 13.

¹⁴ G. 2 : 1 : 12.

circumstances of each particular case. The points chiefly to be considered are the nature and object of the structure, the way in which it is fixed, and the intention as to permanency of the person who erected it. Thus a house constructed of iron and wood, and attached to the soil by posts and nails, has been held to be immovable property, where it was clear that it had been erected not for a temporary purpose but for permanent use.¹⁵ On the other hand, materials, consisting of a patent sprinkler installation, which had been affixed by the owner of the same to a building belonging to another person in such a way that they would under ordinary circumstances have been regarded as fixtures and as forming part and parcel of the building, but under an agreement that they were not to become the property of the owner of the building until paid for, have been held by the High Court of the Orange River Colony not to form part of the building, but liable to be removed upon failure of the building owner to pay for the same, provided at any rate that such removal could be effected without any injury to the building and without prejudice to the rights of third parties who had had no notice of the agreement.^{15a}

A predial servitude may be looked at from two points of view, namely, either as a right or part or quality of the dominant tenement, in whose favour it is constituted, or as a portion of or deduction from the servient tenement, upon which it is imposed. This being so, it must in its nature follow either the property to which it belongs or the property from which it is

¹⁵ *Kimberley Mutual Building Society v. Lewis and others*, 1 H. C. 241; *Cairncross v. Nortje*, 21 S. C. 130; *Olivier and others v. Haarhoff and others*, (1906) T. S. 500.

^{15a} *A. H. Johnson & Co. v. Liquidators of the Grand Hotel and Theatre Co.*, High Court, O. R. C., July 9, 1907.

deducted, and, both of these being immovable, it must of necessity itself also be immovable.¹⁶ A personal servitude, on the other hand, such as usufruct and such like, which may have reference to either movable or immovable property, will be movable or immovable according as the property to which it applies is movable or immovable.¹⁷

A similar distinction also applies to actions, which are either personal actions, that is, actions *in personam*, or real actions, that is, actions *in rem*. A personal action is regarded as a movable, even though it may aim at acquiring the ownership of a thing, and that whether the thing is movable or immovable, for the action is based not upon a *jus in rem* or real right to the thing itself, but upon a *jus in personam* or personal claim against the person sued. An action *in rem*, on the other hand, being entirely based upon the *jus in rem* or real right over or to a particular thing, will vary in its nature according as it aims at movable or immovable property, being movable in the former case and immovable in the latter.¹⁸

Whether any incorporeal right attached to land, which does not amount to ownership of such land, is to be regarded as movable or immovable, will depend upon how it is generally regarded and dealt with by the general laws and customs of the country. If by those laws they are dealt with and can only be disposed of in the same way as land, that is to say, by way of registration in the Office of the Registrar of Deeds, they are as a general rule regarded as immovable property.^{18a} For this reason a prædical servitude

¹⁶ Voet, 1: 8: 20; V. D. K., Th. 179; Schorer, Note 55.

¹⁷ Voet, 1: 8: 20.

¹⁸ Voet, 1: 8: 21; V. D. K., Th.

179; V. L., vol. 1, p. 145.

^{18a} *Ex parte Master of the Supreme Court*, (1906) T. S. 567.

which can only be constituted by registration, is regarded as immovable property.

A mortgage bond on immovable property, however, is in a somewhat peculiar position, being, as it is, an acknowledgment of debt secured by a real right over some particular immovable thing or property. But, as the nature of a thing is to be gathered from that which is its essential or principal part and not from what is merely an accident or an accessory to it, and as the essential part of the mortgage bond is the personal debt, without which the mortgage could not continue to exist, the mortgage bond must be held to be of the same nature as the personal obligation, that is to say, it is movable,¹⁹ and can be dealt with as a movable, without requiring the formalities necessary in the case of immovable property. The same reasoning applies to redeemable rent charges, that is to say, they are movable.²⁰

Movable things are such as are capable of being moved about from one place to another, however heavy they may be²¹ and whether they be individual things or what are called *fungibles*, that is, things which are dealt with by number, weight, or measure.²² A ship, for instance, is movable property.²³

As regards leases, it was decided by the High Court of the South African Republic that a lease in *longum tempus*, that is, for more than ten years, is immovable property.²⁴ This ruling has since been

¹⁹ *Eaton v. Registrar of Deeds*, 7 S. C. 255; *Trustees of Brink v. Mehan and others*, 1 Roscoe, 212; *Newligate v. Registrar of Deeds*, 19 S. C. 269; Voet, 1: 8: 27; V. D. K., Th. 179 and 180; V. L., vol. 1, p. 146.

²⁰ Schorer, Note 54.

²¹ Voet, 1: 8: 11.

²² Voet, 1: 8: 12; 12: 1: 1; G.

3: 10: 1, 3; V. L., vol. 2, p. 53.

²³ *Port Alfred Landing and Shipping Co. v. Bonneville*, 3 E. D. C. 146.

²⁴ *Collins v. Hugo and others*, Hertzog, p. 176, and 10 Cape L. J. 344. See also *Adolfs, N. O., Johannesburg Market Concession and Building Co.*, 3 Off. Rep. 107; *Ex parte Montorio*, 4 Off. Rep. 279.

confirmed and adopted by the Supreme Court of the Transvaal,^{24a} and, though it has not been adopted by the Supreme Court of the Cape Colony, it has been laid down, in accordance with the maxim of the Dutch law "*Huur gaat voor koop*" (Hire goes before sale), that a lease, whether for a long or short period, if validly executed, confers a *jus in re*, as distinguished from a mere *jus in personam*, upon the lessee.²⁵

A further subdivision of things takes place when landed property, which is in law Latin spoken of as a *prædium*, is classified under the two heads of *prædium rusticum* or rural tenement, and *prædium urbanum* or urban tenement, which division is of importance in the question as to the right of a lessee to sublet or to cede his lease, and is also to be found in the distinction between rural and urban servitudes. By these two terms of rural tenement and urban tenement is not meant land situate in the country and in town respectively, but land used for farming or country purposes and land used for house or urban purposes respectively, the mere situation, whether in country or town, not being conclusive.²⁶ *Primâ facie* indeed land, to the extent to which it is not actually built upon, is *prædium rusticum*, but if such land is a mere messuage or accessory to a house and required for the proper use and full enjoyment of the house, it is regarded in law as a *prædium urbanum*.²⁷ But where, for instance, land has been leased which exceeds in extent what is required for the proper use and full enjoyment of any house on it, such

^{24a} *Ex parte Master of the Supreme Court*, (1906) T. S. 567.

²⁵ *Green v. Griffiths*, 4 S. C. 350; *Johns v. Colonial Government*, 15 S. C. 250. *Conf. Maynard v. Usher*,

2 Menzies, 170; and *Preston & Dixon v. Biden's Trustee*, 1 Bach. App. C. 347, and 1 H. C. 301.

²⁶ Voet, 19 : 1 : 4.

²⁷ Voet, 7 : 1 : 21.

land must be regarded as a rural tenement.²⁸ Consequently it has been decided²⁹ that where a portion of a farm had been leased for the purpose of erecting buildings for a shop or mercantile business, the lessee to have the right to quarry stone, make bricks, etc., and to graze a hundred sheep and four horses or mules, and all persons buying at the shop to have the right to outspan, graze and water their animals for twenty-four hours, it was held that it is not the place where the property is situated which shows whether a *prædium* is *urbanum* or *rusticum*, but the use to which it is applied, that under the contract before the Court the property leased could be used for purposes of trade and for nothing else, and that that was sufficient to make it a *prædium urbanum*, and the mere fact that some rights of grazing were included did not alter the nature of the tenement. On the other hand, where two hundred morgen of land had been leased upon the condition, amongst other things, that the lessee should at his own cost built a shop, stable and waggon-house of a certain value, and it appeared that the land was well irrigated and that the lessee had in one season sowed as much as seven muids of rye, the Court decided that it was impossible to hold that the land was required for the proper use of the buildings to be erected, that the lessee intended to carry on farming as well as trading, and as the whole property was included in one and the same lease, the tenement must be regarded as rural.³⁰

Another classification of things is based upon ownership. Considered from this point of view,

²⁸ *Nieuwoudt v. Slavin & Jowell*,
13 S. C. 62.

²⁹ *Swarts v. Landmark*, 2 S. C. 5.

³⁰ *Nieuwoudt v. Slavin & Jowell*,
13 S. C. 58.

things are either (1) such as are unowned or belong to nobody (*res nullius*), or (2) such as are owned or belong to some one (*res alicujus*).³¹ Of the former class some are not only unowned actually, but are also incapable of being owned or appropriated by any individual person (*res extra commercium*); whilst others, though being capable of being owned (*res in commercio*), are actually for the time being unowned, either from the fact of the ownership in them never having been actually appropriated by any one, such as wild animals,³² or from the fact of their having been abandoned by the person to whom they have at one time belonged, with the intention of no longer owning the same.³³

Among things which are incapable of being owned or appropriated are those which are *common* (*res communes*), the ownership of which belongs to no one, but the use and enjoyment of which are common to all.³⁴ These are the air, running water, the sea, and the sea-shore.³⁵ That the air cannot be appropriated by any private individual needs no argument. By running water is here meant the running water of a public stream, public streams being the common property of the whole nation and incapable of being appropriated by a private individual either as a whole or in part. The use of the water running in such streams is common to all who have a legal right of access to the same or are entitled to the same by reason of their being the owners of the land past or through which it flows,³⁶ whether for the support of animal or vegetable life or for purposes of fishing or navigation.

³¹ Voet, 1: 8: 1.

³² Voet, 1: 8: 3; V. L., vol. 1, p. 148.

³³ G. 2: 1: 50-52; V. L., vol. 1, p. 148.

³⁴ Voet, 1: 8: 3.

³⁵ Voet, 1: 8: 3; G. 2: 1: 17, 21; V. L., vol. 1, p. 150; Inst. 2: 1: 1.

³⁶ *Hough v. Van Der Merwe*, 4 Buch. 153; *Retief v. Louw*, 4 Buch. 175.

The same rule also applies to the sea, and to all ports and harbours forming part of the sea or of navigable public streams.³⁷

By the sea-shore is meant that portion of the shore which lies between high and low water-mark, the use of which is common to all and can be prohibited by none, though the regulation of such use, in the interests of all who are entitled to it, is vested in the Government.³⁸

Besides things common the Roman law recognized another class of things which were not capable of being the object of private ownership, namely, things which were said to be *divini juris* or devoted to religious or quasi-religious purposes. These were of three kinds, namely, *res sacræ*, *res religiosæ*, and *res sanctæ*.³⁹ The first of these consisted of property consecrated by the sovereign authority of the State to the service of God, such as churches,⁴⁰ and the second of property devoted to the burial of the dead, such as burial-grounds.⁴¹ *Res sanctæ* or hallowed things were the walls and gates of cities, injury to which was declared a criminal offence.⁴² None of these things, however, are *res nullius* at the present day, but are possessed in full ownership by the individuals or communities to whom they belong and who may deal with them as such, except in so far as this may be prohibited by any statutory or other legal provision to the contrary.⁴³

³⁷ Voet, 1: 8: 8.

³⁸ *Anderson & Murison v. The Colonial Government*, 8 S. C. 393; *Colonial Government v. Town Council of Cape Town*, 19 S. C. 96; Voet, 1: 8: 3, 4, 9; G. 2: 1: 22.

³⁹ Voet, 1: 8: 1, 5-7.

⁴⁰ Voet, 1: 8: 5.

⁴¹ Voet, 11: 7: 1.

⁴² Voet, 1: 8: 7.

⁴³ *Cape Town and District Waterworks Co. v. Executors of Elders*, 8 S. C. 11; Groen., De Leg., Inst. 2: 1: 8, and C. 3: 44: pr.; G. 2: 1: 15, 37; V. L., vol. 1, p. 148.

Property which is owned is either public or private.⁴⁴

Public things are those which belong to the people of the country as a whole, as between whom they are in the same position as things common, but they are not in this relation called common, because common things are unoccupied and are *res nullius*, whereas things public have ceased to be *res nullius* by the fact of their having been occupied by the State, within whose territory they fall.⁴⁵ The term "public" as here used must be distinguished from the word public when applied to State property, that is, property belonging to the State as a government, corporation, or person, and which is in fact the private property of the State as such person. The term as here used applies to that portion of the State property the use of which is common to all the people of the country, or at any rate to all those who are entitled to have legal access to it, such as public roads, public harbours, and public rivers.⁴⁶

As regards rivers, our law recognizes two classes of natural streams or water-courses, viz. public and private. Under the designation of public streams are included all perennial streams, whether navigable or not, and all streams which, although not large enough to be considered as rivers, are yet perennial and are capable of being applied to the common use of the riparian proprietors. Under the designation of private streams are included all rivers and streams which are not perennial, and streams which, although perennial, are so weak as to be incapable of being applied to such common use.⁴⁷ With respect to a private stream,

⁴⁴ Voet, 1: 8: 1.

⁴⁵ Voet, 1: 8: 8.

⁴⁶ Voet, 1: 8: 8; V. L., vol. 1, p.

151.

⁴⁷ *Van Heerden v. Wiese*, 1 Buch. App. C. 7; *De Wet v. Hiscock*, 1

the owner of land upon which it is found has the same complete right as with respect to any other portion of his private property,⁴⁸ but with respect to a public stream the riparian proprietors have all got common rights which have to be exercised by each with a due regard to the interests of all, as will be shown further on when dealing with rights of ownership. For the rest, all persons, whether they are riparian proprietors or not, who can have legal access to a public stream, have the right of navigating and of fishing in them.⁴⁹ As regards the rights of navigation, these may apply either to streams which are themselves navigable or to streams which are not navigable themselves but are affluents to navigable streams and as such help to render these latter navigable. Any interference with the water of a public stream whereby the navigation of such stream or of another public stream may be damaged is forbidden in the public interests, and will be restrained by interdict.⁵⁰ It may further be stated that the rights of the general public to the waters of a public stream, whether it is navigable or not, will entitle any member of the public to apply for an interdict to prevent anything being done in the public stream whereby the ordinary and accustomed flow of the stream is altered to the injury and damage of those living in the neighbourhood; and, in case the alteration has already been effected, for an order of Court compelling the restoration of the stream to its original condition and for compensation for any damage which may have been sustained.⁵¹

E. D. C. 257; *Relief v. Louw*, 4 Buch. 187; *Southey v. Schoombie*, 1 E. D. C. 286; Voet, 43 : 12; 39 : 3 : 1.

⁴⁸ Voet, 43 : 12.

⁴⁹ Voet, 1 : 8 : 8.

⁵⁰ Voet, 39 : 3 : 1; 43 : 12.

⁵¹ Voet, 43 : 13. See also Voet, 1 : 8 : 9.

CHAPTER II.

JURA IN REM.

By the term *jura in rem* or real rights is meant all those rights which are included under the idea of the ownership of a person over a particular corporeal thing, without special reference to any other person who is under any special obligation with regard to it.¹ These rights vary from the right of *possession*, which is only removed by one step from being considered in law as a mere fact and not as a right at all,² to the right of full *ownership*, which includes the whole sum of all possible *jura in rem*.³ A real right (*jus in rem*) is the right to deal with a thing in any way whatsoever.⁴ It differs from the mere physical detention or physical power of disposing of the thing, inasmuch as, though it may exist conjointly with such detention, it does not necessarily cease when such physical detention is lost. The peculiarity of a real right or *jus in rem*, as distinguished from a personal right or *jus in personam*, is that it adheres or is attached to the thing, which is its object, so closely that it may be enforced by the person, who is entitled to it, against any person whomsoever who interferes with it, and not merely against a particular person who is under special obligations with regard to it.⁵ This is done by an action *in rem*, that is, an action aiming at the recovery or protection of the thing itself, of which a person has been deprived or which is being interfered with by any one whomsoever. So closely indeed is a *jus in rem* bound up with

¹ G. 2: 1: 58.² Voet, 41: 2: 2.³ G. 2: 1: 60.⁴ Voet, 5: 2: 1.⁵ Voet, 5: 2: 1, 2; V. D. L. 112.

the thing to which it attaches that it ceases *ipso facto* with the destruction of such thing.

These rights or *jura in rem* may be classified under the following heads, namely, (1) Possession, (2) Ownership or Dominium, (3) Servitudes, (4) Mortgages, and (5) Rights of Inheritance or Succession and Rights to Legacies.⁶

CHAPTER III.

POSSESSION.

POSSESSION is the simplest form of real right or *jus in rem*, so much so that it has even been doubted by some jurists whether it is a right at all, or whether it ought not rather to be regarded as a mere fact.¹ It is certainly a fact, but it is something more. It is a compound of a physical situation and of a mental state, that is, of the physical holding or detention of a corporeal thing by a person and of the mental state of that person towards the thing. In other words, it is the physical detention of a corporeal thing by a person, whether with or without any claim of right, with the intention of holding it as his own,² to which the law has given its sanction by interposing certain legal remedies or interdicts for its protection, in case of its being interfered with by other persons.³ But it is essential to the existence of possession that there should at one time or another have been both such

⁶ Voet, 5 : 2 : 2 ; V. D. L. 113.

¹ V. D. L. 113, 183.

² *Kemp v. Roper*, 2 Buch. App. C. 143 ; *Oosthuysen v. Estate of Oos-*

thuysen, (1903) T. S. 691 ; Voet, 14 : 2 : 1 ; G. 2 : 2 : 2 ; V. L., vol. 1, p. 198 ; V. D. L. 183, 184.

³ V. D. L. 184.

detention or occupation and such intention present together at one and the same time.⁴ The intention must also absolutely be to hold the thing for one's self and not for another, for a lessee, a person who has a thing on loan, or a depositary, cannot in strict law be said to possess, or, if he possesses at all, he possesses not for himself but in the name of the owner.⁵ Such a person has merely the physical detention of the thing leased, lent, or deposited, by the leave and licence of the owner and on his behalf. The real possession is in the owner, with whom is the intention of still keeping the thing as his own, and who exercises his detention through the lessee, borrower, or depositary.⁶

It follows from the above definition of possession, and the fact that it can only exist where there is a holding for one's self, that only those things are capable of being possessed which are capable of being owned, and that only those persons are competent to possess who are competent to own property, as to which points we shall treat further on.

It follows also from the very nature of possession that, in so far as it consists in physical detention, two persons cannot have possession of one and the same thing *singuli in solidum* at one and the same time,⁷ but they may clearly have such joint possession as far as the mind or intention is concerned, the physical possession being held by one of them, or even by a stranger, for all of them jointly or in divided shares.⁸

There is nothing also to prevent two persons from

⁴ G. 2 : 2 : 4.

⁵ V. D. L. 183. As regards the lessee, it is an open question whether, with our legal maxim of "*huur gaat voor koop*" (*hire goes before sale*), there be not such a real right in the lessee as to give him, pending the

lease, the possession of the thing similar to the possession of a pledgee.

⁶ Voet, 41 : 2 : 13.

⁷ Voet, 41 : 2 : 5.

⁸ Voet, 41 : 2 : 1, 12.

possessing the same thing at the same time with different kinds of possession, *e.g.*, where one person who has acquired possession both with the body and with the mind retains possession with the mind, but another person in his absence by stealth (*clam*) and without his knowledge takes unlawful possession of the thing, in which case the former would be holding either *bonâ fide* or *malâ fide*, according to circumstances, but the latter clearly *malâ fide*.⁹ So also where one person possesses the ground itself but another person holds the superficies by means of buildings erected thereon, though in this case they can hardly both be said to possess exactly the same thing.¹⁰

From what has been said thus far it is clear that possession in its strictly legal signification can only obtain with respect to corporeal things which alone are capable of physical occupation or detention; but the use of the term has been extended also to incorporeal things, such as servitudes or rights of action, in which case the possession is spoken of as a quasi-possession.¹¹ In such a case the possession is represented by the actual exercise of the servitude or right, to which a person claims to be entitled in his own right.

Possession has by the text-writers been variously classified under the heads of *civil* and *natural* possession. Voet uses the term *civil* possession as applying to the possession which is held by a person as owner or by a *bonâ fide* possessor with the intention of being or becoming owner; but he also uses it in a secondary sense as applying to possession which exists by implication of law where there is no actual physical detention

⁹ Voet, 41 : 2 : 5.

¹⁰ Voet, 43 : 17 : 3.

¹¹ Voet, 41 : 2 : 11; G. 2 : 2 : 5.

or occupation, as where a person possesses by his own intention but through the corporeal detention of another, or continues to possess by intention alone, after having lost the physical detention, but before there has been occupation by another person,¹² as will be shown further on.

By natural possession he means any possession other than the above, including under the term as well possession in a strictly legal sense, as defined above, whether it be *bonâ fide* or *malâ fide*, as the physical detention of property, the legal possession of which is in another person, by a person who is in the position of a usufructuary, a pledgee, a lessee, or a person who holds a thing during the pleasure (*precario*) of the legal possessor, and also the bare physical detention of a thing.¹³

Possession, considered from the point of view of the ground or title upon which it rests, was divided amongst the Romans into *possessio justa* and *possessio injusta*, of which the latter was that by which a person obtained either by force (*vi*) and against the will of a former possessor, or by stealth (*clam*) and without his knowledge, or by his mere leave and licence (*precario*), that which immediately before was in the possession of another. Such possession was said to be *injusta* as against such previous possessor, or, as we should say, faulty or imperfect, though it was perfectly valid and complete as against all other persons.¹⁴ *Possessio justa* was that which suffered from no such fault or defect, that is, which had its origin neither in force, nor in stealth, nor in a tenancy at pleasure (*nec vi, nec clam, nec precario*), and which may therefore be classified as flawless or

¹² Voet, 41: 2: 3.

¹³ *Ibid.*

¹⁴ Voet, 41: 2: 4.

perfect possession. Of this latter kind is the case where the possession of a thing has been left vacant through abandonment by the previous possessor, or where possession has been taken openly with his knowledge and without any active opposition on his part.¹⁵ In this connection it must be noted as a rule of our law that no person is entitled during the course of his possession to alter the ground or title of his possession of his own mere motion (*nemo sibi ipse causam possessionis mutare potest*), that is, without the intervention of some extrinsic cause.¹⁶ This will not, however, prevent a possessor from giving up a possession held on a particular ground or under one title, and then with the intervention of some new act, either actual or fictitious, taking possession of the same thing on some other ground or under some other title.¹⁷ Thus a depositary who converts the thing deposited with him to his own use by way of theft or otherwise, and determines to possess the thing for himself and not to return it to the depositor, ceases to hold as depositary, and begins to possess for himself as an unjust possessor on the grounds of the theft or conversion committed by him.¹⁸ In the same way if a lessee of land refuses to give up possession at the termination of his lease either to the lessor or to the person to whom the lessor has sold and transferred the land, he becomes an unjust or *malá fide* possessor as regards the owner of the ground.¹⁹ Again, if a depositary uses money deposited with him as though it had been lent to him by the owner instead of being merely deposited, it is clear law that he begins to hold

¹⁵ Voet, 41 : 2 : 4.

¹⁶ Voet, 41 : 2 : 13.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

the money as a debtor on the ground or under the title of a loan.²⁰

A third division of possession is into *bonâ fide* and *malâ fide* possession,²¹ a distinction which will become of importance when we consider the right of a possessor to compensation for improvements made by him on land possessed by him. A *bonâ fide* possessor is one who thinks that he has a just title as owner of the thing possessed, or at any rate that no one else has a better title than himself to the possession; ²² a *malâ fide* possessor is one who labours under no such impression, but knows that he has no right or title to possess the thing.²³

Of these three modes of classification the only one which is of any practical importance is the last, which, as will be seen further on, is of importance in considering the question as to what compensation for improvements made by him on property in his possession a possessor will be entitled to.

In connection with possessory rights themselves, which, as will be shown further on, consist mainly in the right to defend the possession which one has against other persons, the only distinction which is of importance at the present day is that between possession proper or possession in the strict legal sense of the term, and mere detention, which is also in ordinary parlance spoken of as possession.

²⁰ Voet, 41 : 2 : 13.

²¹ G. 2 : 2 : 9.

²² G. 2 : 2 : 10.

²³ G. 2 : 2 : 11.

CHAPTER IV.

THE ACQUISITION OF POSSESSION.

As regards the modes of acquisition of possession, it may be laid down generally that the rules of the Roman law with respect to the acquisition, as well as the retention and loss of possession, are still in most respects preserved and recognized amongst us.¹ This being premised, it is essential from the very nature of possession that its acquisition, in order to be recognized by the law, shall be effected in such a manner that both the corporeal and the mental requisites are present at the same time, in other words, that there shall be a corporeal thing and a person, and that they shall be placed in such a position in relation to each other that the person shall have the physical detention or occupation of the thing or what is in law regarded as equivalent thereto, and that in addition the person shall have in his mind the intention of holding it on his own account. In other words, it is necessary that he shall take the thing corporeally or place himself in such a position with reference to it as to have the control of it, and that he shall do so with the intention of holding it for himself. The mere taking of the thing without the intention will not be sufficient to establish possession, nor will any amount of intention produce possession without an actual taking.²

For the taking (*apprehensio*) of a thing actual immediate physical contact with the thing is not necessarily required, as long only as the person acquiring places himself in such a position with reference to the thing as to have the physical power

¹ Voet, 41 : 2 : 17.

² Voet, 41 : 2 : 10 ; V. D. L. 183.

of dealing with it whenever he pleases, and of excluding others from dealing with it.³ This is in law considered as happening whenever a person lays hold of a thing with his hand, whether by way of the original occupation of an unowned thing or *res nullius*, or as the result of a delivery to him by a previous possessor.⁴

By delivery is meant the placing another person in legal possession of a thing so that he may deal with it as his own. It need not necessarily be the actual physical or bodily handing over of the thing, which indeed may be physically impossible, but may be constructive, that is, presumed from certain circumstances.⁵ The delivery of possession of movable property may therefore be effected in one or other of the following ways :—

(1) By the transferror placing the transferee in actual physical possession of the thing.⁶

(2) By placing the thing within the custody of the transferee, as by depositing it in his house during his absence.⁷

(3) By the transferror placing the thing before the transferee with the object of transferring the possession, in which case the delivery is said to be *longa manu traditio*.⁸

(4) By the delivery of that by means of which the physical detention of the thing may be acquired, *e.g.*, by the delivery of the keys of a warehouse in which the property to be delivered is locked up,⁹ which is sometimes spoken of as symbolical delivery.¹⁰

³ Von Savigny, on Possession, pp. 142-148.

⁴ Voet, 41: 2: 9, 10.

⁵ Voet, 12: 1: 5, 6.

⁶ Voet, 41: 1: 34.

⁷ Voet, 41: 2: 9.

⁸ *Haupt's Trustee v. Haupt*, 1 Searle, 287; *Estate of Weymar v. Le*

Roux, 23 S. C. 173; Voet, 41: 1: 34; 41: 2: 10. See also Voet, 12: 1: 4, 5, 6.

⁹ *Haupt's Trustee v. Haupt*, 1 Searle, 287; *Court v. Mosenthal & Co.*, 13 S. C. 127; Voet, 41: 2: 9; G. 2: 5: 12.

¹⁰ Voet, 41: 1: 34; V. L., vol. 1, p. 186.

(5) By agreeing that a person, who has the physical detention of a thing in the name of the transferror, shall in future possess it in his own name, which is called *brevi manu traditio*.¹¹

When a thing consists of several parts, or is of a considerable size or extent, it is not necessary that all the parts or that the whole extent of it shall be occupied or taken hold of. Thus the act of taking is, in the case of a field, completed when a person enters upon a portion of it with the consent of the previous possessor and with the intention of acquiring possession of the whole,¹² or when it is pointed out to him from a short distance by the previous possessor with the object and intention of making over the possession. If, however, possession is taken without the consent of the previous possessor, it is acquired only over that portion which is actually occupied by the new possessor.¹³

The second requisite of the acquisition of possession is that the taking shall be effected not only physically but also with the mind, that is, with the intention of holding the thing as one's own, which can only, therefore, be done by persons who are capable of the will to possess, and those not only natural persons but even fictitious persons, such as corporations, who can take possession through their officials.¹⁴ Lunatics, consequently, and infants, *i.e.*, persons under seven years of age, cannot acquire possession except through their guardians or curators; but minors, it would appear, may do so without the consent of their guardians, provided they have passed the age of

¹¹ Voet, 41: 1: 34; 41: 2: 10;
G. 2: 5: 11.

¹² Voet, 41: 2: 9.

¹³ *Ibid.*

¹⁴ Voet, 41: 2: 6.

infancy, that is, seven years, inasmuch as by acquiring possession they may improve their position without placing themselves under obligations to others.¹⁵

It is almost unnecessary to add that when the person who is to acquire the possession has already got the actual corporeal detention or occupation of the thing, there will be no necessity for any fresh taking.¹⁶ It will be sufficient in such a case if the detention is supplemented by the other requisite of possession, namely, the intention to possess for himself, as where property which has hitherto been held as a mere deposit becomes the property of the depositary under a contract of sale or donation. So where a person, whilst he had the sole and entire control and management of a restaurant business as manager for another, made pecuniary advances to his employer under an agreement that he was to hold certain furniture and fixtures in the restaurant as a pledge for the advance, it was held that the pledge was valid, though there had been no fresh delivery of the articles pledged.¹⁷ Such a delivery was called amongst the Romans a *brevi manu traditio*.

The exact converse of the *brevi manu traditio* was the *constitutum possessorium*, the former being, as already shown, the conversion of the bare detention into juridical possession by the intention or an act of the mind merely, and the latter a conversion of possession into bare detention, the juridical possession being thereby transferred to another person.

The peculiarity of the *constitutum possessorium* is

¹⁵ Voet, 41 : 2 : 6.

¹⁶ G. 2. 4 : 11 ; V. L., vol. 1, p. 186.

¹⁷ *Assignees of O'Callaghan v. Cavanagh*, 2 S. C. 122.

that a person who has the lawful possession of a thing transfers the possession or effects delivery merely by virtue of his own intention, either express or implied, to hold the thing in future as the agent of another.¹⁸

A *constitutum*, however, is not to be presumed, unless its existence necessarily follows from the other circumstances of the case.¹⁹ How carefully this test is applied will sufficiently appear from the following words of De Villiers, C.J., in the case of *Orson v. Reynolds* ²⁰:—"That doctrine" (of the *constitutum possessorium*) "has often afforded a refuge to counsel when every other argument has failed, but I am not aware of any case in the Supreme Court in which it has been found applicable. . . . In the case of *Mills v. Benjamin* the principles of *constitutum possessorium* were discussed in the Supreme Court, but the decision was not based upon it. . . . I do not understand the doctrine of the *constitutum* as dispensing with the necessity of delivery. The physical transmutation of possession may under certain circumstances be dispensed with, but the necessity for delivery or its legal equivalent remains. . . . No principle is more clearly established than that a *constitutum* is not to be presumed unless its existence necessarily follows from the other circumstances of the case."

Possession, further, may be acquired not only by the possessor personally, but also through the medium of an agent;²¹ but in the latter case it is essential not only that the agent shall have the legal authority to acquire on behalf of his principal, but that he shall

¹⁸ Voet, 12: 1: 5.

¹⁹ *Mills & Sons v. Benjamin Brothers*, 6 Buch. 123.

²⁰ 2 Buch. App. C. 105. See also

Jefferson, N. O., v. De Morgan, 2 E. D. C. 205.

²¹ Voet, 41: 2: 12; G. 2: 2: 4.

have the intention of so acquiring.²² Where these requisites are both present, the delivery will be valid even if made without the knowledge of the principal.²³

The acquisition of the quasi-possession of a servitude is in the very nature of things not effected by actual taking or occupation, which only applies to corporeal things, but by the use and exercise of the servitude in an open and *bonâ fide* manner and as a matter of right, and not by force or stealth or merely with the leave and licence of the previous possessor and during his pleasure (*nec vi, nec clam, nec precario*).²⁴

CHAPTER V.

THE EFFECT OF POSSESSION.

THE effect of possession is to entitle the possessor to retain the things possessed by him and to forcibly resist whoever attempts to deprive him of it or disturb him in his possession without judicial authority,¹ for no one may be dispossessed, even upon the grounds of ownership or a superior right in the party attempting to dispossess, except under a judgment or decree of a competent Court.² A possessor may also enforce or defend his possessory rights by judicial process in a formal action *in rem* for the recovery of the possession, if it is detained from him by another person, or by way

²² Voet, 41: 2: 8.

²³ *Mills & Sons v. Trustees of Benjamin Brothers*, 6 Buch. 122.

²⁴ Voet, 41: 2: 11.

¹ G. 2: 2: 6.

² V. D. L. 184.

of possessory interdict, if his possession is interfered with.³

Possessory interdicts have reference either to the protection of the possession which is being disturbed or for the recovery of possession of which one has been deprived. For the former purpose the Romans used the interdict "*uti possidetis*"⁴ as regards immovable property, and that of "*utrobi*" as regards movables;⁵ and for the latter purpose the interdict "*unde vi*" as regards immovable property.⁶

Under Roman-Dutch law three remedies obtained against the disturbance of possession, namely, (1) the mandament of *complainte*, (2) the mandament of *maintenue*, and (3) the mandament of *spolie* or spoliation.⁷ Of these the first two, which were of a somewhat cumbersome character,⁸ have become obsolete, and the only remedies known to our law are the ordinary penal interdicts, the mandament or writ of spoliation, and the ordinary action at law.

The ordinary interdicts will only be granted in accordance with certain rules, it being necessary amongst other things for the applicant to show that he has a clear right, and that he will be remediless, if the interdict is not granted.⁹ If he is not in a position to do this, he may proceed by way of an application for a mandament or writ of *spoliation*, which will lie even where the applicant's possession has been wrongful and where he has other remedies open to him.

The mandament of spoliation applies to cases in which a person has been deprived of the possession of

³ Voet, 41: 2: 16.

⁴ Voet, 43: 17.

⁵ Voet, 43: 31.

⁶ Voet, 43: 16.

⁷ Voet, 43: 17: 7; Schorer, Note

62; V. D. L. 185.

⁸ V. D. L. Jud. Pract., 2: 21: 3, 4; Voet, 43: 17: 7; Schorer, Note 62; and 2: 20: 2, 3.

⁹ V. D. L. 440.

property, whether movable or immovable, by force or violence, or by stealth,¹⁰ its object being to set aside the forcible dispossession with all its effects and to replace everything in the state in which it was before the act of spoliation was committed.¹¹ Where this is the only object aimed at, the applicant may proceed by way of motion, in which case the usual course is to make an *ex parte* application for a rule *nisi* calling upon the respondent to show cause at a future date why he shall not be condemned *ante omnia* to restore possession, such rule to act as an interim interdict restraining the respondent from selling or otherwise disposing of the property. If upon the return day the previous possession by the applicant and the forcible dispossession of him by the respondent are established, the rule is made absolute; if not, it is discharged.¹² In such a case a plea of ownership on the part of the respondent will be no answer to such an application. In spite of such a defence the Court would still have the power to order, and, as a rule, will order, the restitution of possession before the question of ownership can be gone into, pending an action upon the merits.¹³ Where, from the circumstances of the case, it is not one suitable to be decided by this summary method of procedure, or where the applicant in addition to

¹⁰ *Ncotama v. N'Cume*, 10 S. C. 207; *Swanepoel v. Van der Hoeven*, 8 Buch. 4; *Crause v. Reyersbach*, 1 S. A. R. 50; *Connell v. Factor & Lax*, 6 Cape Times, 100; Windscheid, *Lehrbuch des Pandektenrechts*, § 162a; Wassenaar, *Jud. Pract.* vol. 1, c. 14 (*Van Spolie*), §§ 7, 17, 18; *Reid v. Gumenke*, 19 S. C. 312; *Blomson v. Boshoff*, (1905) T. S. 429; *Nino Bonino v. De Lange*, (1906) T. S. 120.

¹¹ V. D. L. 449.

¹² *Executors of Haupt v. De Villers*,

3 Menzies, 341; *Klipplaats Woolwashing Co. v. John Benjamin Leach*, 7 E. D. C. 206; *Sitsitsha v. Fana*, 11 E. D. C. 73; *McLoughlin v. Delahunt*, Foord, 129; *Reynolds v. Orson*, 3 H. C. 145; *Swanepoel v. Van der Hoeven*, 8 Buch. 4; *White & Tucker v. Rudolph*, Kotze, 115; *Crause v. Reyersbach*, 1 S. Af. Rep. 50; *Ncume v. Kula*, 19 E. D. C. 340.

¹³ *Loots v. Van Wyk*, 16 S. C. 419; *Executors of Haupt v. De Villiers*, 3 Menzies, 341; *Crause v. Reyersbach*, 1 S. Af. Rep. 50.

restoration of possession wishes to sue for compensation in damages, the proper course would be to proceed by way of action,¹⁴ in which case the respondent or defendant may set up his defence of ownership,¹⁵ or set up a counter-claim for a mandament of spoliation.¹⁶

Neither upon motion nor in the action will it be necessary for the applicant or plaintiff to declare or prove in the first instance under what right or title he possesses,¹⁷ the burden of proof being on his adversary to show that he has a better title to possess.¹⁸ It will be sufficient for him to show that at the time of the disturbance he was in actual possession,¹⁹ whether such possession was civil or natural, whether it was faulty or not (*justa aut injusta*) (except as against the person from whom the unjust possession had been taken *vi, clam, or precario*), provided only that it was possession proper, that is, that the possessor was holding possession in his own right²⁰ and had not merely the bare detention of the thing in the name of another.²¹ A pledgee, for instance, will be entitled to this remedy,²² and so under our law will a lessee,²³ though under Roman law this was not the case, on the ground that the lessee did not possess in his own name.²⁴ The action will lie even where the original possession was illegal, provided it has not been judicially set aside on the grounds of such illegality.²⁵ Thus where a person who was in

¹⁴ V. D. L. 449; Voet, 43: 16: 6;
White & Tucker v. Rudolph, Kotze,
115.

¹⁵ Voet, 43: 16: 3.

¹⁶ V. D. L. 449; Voet, 43: 17: 7.

¹⁷ V. D. L. 184; G. 2: 2: 7;
V. L., vol. 1, p. 198, and vol. 2, p.
433.

¹⁸ *Loots v. Van Wyk*, 16 S. C.
419; V. L., vol. 1, p. 199.

¹⁹ Voet, 41: 2: 16.

²⁰ Voet, 43: 16: 3.

²¹ *Kemp v. Roper*, 2 Buch. App.
C. 143; Voet, 43: 16: 3.

²² Voet, 43: 16: 3; *Klipplaats*
Wool-Washing Co. v. J. B. Leach, 7
E. D. C. 206.

²³ *Swanepoel v. Van der Boeven*,
8 Buch. 4; *McLoughlin v. Delahunt*,
Foord, 129.

²⁴ Voet, 43: 16: 3.

²⁵ Voet, 41: 2: 16; 43: 16: 3.

possession of a rough or uncut diamond, which under the Diamond Trade Act it was not lawful for a private individual to hold without a permit, handed over the diamond to the Detective Department with the view of obtaining a permit, it was held by the Court that it was the duty of that Department to decide within a reasonable time whether they intended to take criminal proceedings against the possessor, and, if they decided not to do so, to return the diamond to the possessor; and that, if they failed to do so, they were liable to an action at suit of the possessor for the restoration of the diamond.²⁶

In addition to the above rights possession carries with it this further benefit, that if it is continued for a sufficiently long time, that is to say, for the period required for prescription, it may ultimately eventuate in absolute ownership.

CHAPTER VI.

THE LOSS OF POSSESSION.

POSSESSION, when it has once been duly established, will continue as long as both the essentials of possession, namely, the physical detention of the corporeal thing and the intention to possess, are present.¹ It is lost whenever the physical detention is absolutely lost, that is, whenever the possessor is by some act or occurrence permanently deprived of the physical power of dealing

²⁶ *Pentz v. The Colonial Government*, 8 S. C. 34; *Richards v. The Attorney-General*, 18 S. C. 164.

¹ V. D. L. 183.

with the thing at his discretion; but not when he only temporarily loses the detention, so long as nothing else has happened to deprive him of the control of it.²

Possession is lost by an occurrence when the thing, which is its object, perishes or is lost to the possessor in such a way as to cease absolutely to be within his control, as when domestic animals stray or captured wild animals escape from custody or domesticated animals cease to have the habit of returning.³ It ceases by the act of another person whenever the possessor is forcibly deprived of the physical detention of a thing, whether movable or immovable. The same is the case also as regards movables when physical occupation of them is taken in the absence of the previous possessor by stealth, the possession of movables being more easily lost than that of immovables.⁴ As regards immovables, it is in such a case further required that the previous possessor shall upon his return have attempted to resume his physical occupation of the property and shall have been prevented from doing so by the new possessor and shall have acquiesced in such exclusion.⁵ In other words, the new occupation must be taken adversely to and to the exclusion of the previous possessor. When the latter is present and is deprived of the occupation by force, the adverse and exclusive character of the new occupation is sufficiently apparent, and so it is also from the very nature of such property whenever movable property belonging to him is taken possession of by stealth in his absence. But in order to ascertain whether the occupation of immovable property by a

² G. 2: 2: 4, 12; Voet, 41: 2: 12,
15.
³ Voet, 41: 2: 15.

⁴ Voet, 41: 2: 15.
⁵ Voet, 41: 2: 12, 15; G. 2: 2:
4, 12.

new possessor in the absence of the previous one is taken with the object of possessing it for himself or merely subject to the leave (*precario*) of the previous possessor and to the continuing right of the latter to resume possession, it is necessary that the occupation of the former shall have been rendered actively adverse by an attempt of the latter to resume occupation and by his exclusion upon so doing. In such a case the possession is practically lost with the consent of the previous possessor.⁶

Possession is lost by intention whenever a possessor expressly renounces the intention to possess,⁷ whether such renunciation is accompanied by actual physical abandonment or not. A minor being, in the eye of the law, devoid of mind or intention, cannot abandon possession without the authority of his guardian, even though he may have given up the actual physical detention of the thing.⁸

The death of the possessor also puts an end to the possession, so much so that it is not considered as passing to heirs, unless physical occupation follows.⁹

Possession is lost both by act and intention whenever a person hands over a thing to another person with the intention of ceasing to possess and of making over the possession to the latter. Both the act and the intention are necessary for this purpose, though the act may not be equally apparent in all cases. Where, for instance, a possessor enters into an agreement with another to the effect that, though continuing in the physical occupation of the thing, he will in future hold it not for himself but for the latter, that is to say, by a

⁶ Voet, 41: 2: 12.

⁷ G. 2: 2: 12.

⁸ Voet, 41: 2: 15.

⁹ Voet, 41: 2: 10; G. 2: 2: 12;
V. D. K., Th. 182.

constitutum possessorium, the act is sometimes somewhat difficult to discover, but still the law insists that there shall be something more than a mere intention subsisting in the mind of the former possessor.¹⁰ As an instance of this, Voet mentions the case of one person selling or making a donation of a piece of ground or a house to another upon the understanding that he is himself to remain upon the land or in the house as tenant or that he is to have the usufruct or *usus* of it as long as he pleases, in which case he acquires the possession for the purchaser or donee and in future holds the possession for the latter.¹¹ All this, however, must be accepted with the reservation laid down above with respect to the *constitutum possessorium*, namely, that it will not be presumed unless its existence necessarily follows from all the circumstances of the case.¹²

Possession may be lost, as well as acquired, through an agent, and this may happen in any of the ways in which the principal himself might have lost it, except that possession is not lost by the death of the agent. In the matter of renunciation also, if a person who holds possession of land as agent for another abandons it without authority from the principal, the possession will not thereby be lost to the principal until the ground has been occupied by a third party and the principal, though being aware of the fact, has not ventured to reclaim possession.¹³

¹⁰ Voet, 41: 2: 13, 15.

¹¹ Voet, 41: 2: 13.

¹² See p. 23, above.

¹³ Voet, 41: 2: 12.

CHAPTER VII.

OWNERSHIP.

THE term ownership, though sometimes used in the sense of including everything that belongs to a person, whether corporeal or incorporeal, applies in a more limited and in its strictly legal sense only to things corporeal, and corresponds to the *dominium* of the Roman law. In this limited sense ownership is the sum-total of all the real rights which a person can possibly have to and over a corporeal thing,¹ subject only to the legal maxim : “*Sic utere tuo ut alienum non lædas*” (So use your own that you do no injury to that which is another’s). These rights are comprised under three heads, namely, (1) the right of possession, ownership having indeed been defined by some as consisting in the rights to recover lost possession ;² (2) the right of usufruct, that is, the right of use and enjoyment ;³ and (3) the right of disposition.⁴

The rights of possession have already been sufficiently discussed.

The right of enjoyment implies the rights of user and of acquiring the fruits or increase of the thing used, whether these be the young of animals or the fruits of the ground.

The right of disposition carries with it the right of alteration, and even of destruction, in addition to the right of alienation.⁵

These three factors are all essential to the idea of

¹ Voet, 6 : 1 : 1.

² G. 2 : 3 : 4.

³ Voet, 7 : 1 : 3.

⁴ V. D. L. 115 ; Holland’s Juris-

prudence, 7th ed., p. 180.

⁵ Holland’s Jurisprudence, pp. 181, 182.

ownership, but need not all be present in an equal degree at one and the same time. Thus, though there need not be actual use and enjoyment present in every case, the right of alienation, coupled with the legal means of effecting such alienation, is at all times necessary in order to constitute valid ownership; and perhaps a more correct definition of ownership would be that it is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating the same and coupled with the right to claim the possession and enjoyment thereof. In the case of a lease, for instance, whether of movable or immovable property, the present enjoyment of the property is in the lessee, but all the other ingredients of ownership, including, it would appear, the *possession* in the strict legal sense of the term,⁶ are in the lessor or owner. In a usufruct, again, both the actual possession and the enjoyment are in the usufructuary, but the major part of the ownership, which consists in the right of, and in the possession of the means of, alienation, is in the person to whom the property is to go at the termination of the usufruct.⁷ In the case of a pledge and mortgage, again, all the rights of ownership remain in the owner, subject only to a restriction on the legal means of alienation, which in the case of pledge carries with it at the same time the possession, and may, as in the case of a contract of *antichresis*, include also the use and enjoyment of the thing, but which restriction it will be at all times in the power of the owner to remove by paying the debt or satisfying the obligation in security of which the pledge or mortgage was given. A servitude, on the other hand, is a permanent limitation to or derogation from the right of enjoyment, owing to a right to

⁶ See p. 14, above.

⁷ *Klopper v. Smit*, 9 S. C. 167;

Voet, 7:1:12, 13; 6:1:1.

a share in the use and enjoyment vested in some one other than the owner.

A more difficult and complicated question as to ownership arises in the case of *fideicommissum*, which is subject to certain distinctions. By the text-writers on our common law and in general legal parlance the ownership in fideicommissary property is said to be vested in the fiduciary until the condition of the fideicommissum is fulfilled, after which it vests in the fideicommissary;⁸ but the more correct mode of expression, it is submitted, under our law would be that the right to *claim* the ownership subject to the fideicommissum is in the fiduciary until the fulfilment of the condition, after which the right to *claim* the full ownership without any limitation will be in the fideicommissary.⁹ This right both of the fiduciary and fideicommissary is a real right or *jus in rem*,¹⁰ which may be enforced by means of a *vindicatio rei*,¹¹ and which, in the case of immovable property, may be registered against the title of the property,¹² but it is not the full ownership. The real position is this, until the condition of the fideicommissum is fulfilled the fiduciary has the right to claim all the rights of ownership, with the exception of the right of alienation, which he can only exercise subject to the terms of the fideicommissum. As soon as it is clear that the condition of the fideicommissum has failed, he may claim that his limited right shall be converted into full ownership. Upon the fulfilment of the condition, the fideicommissary in his turn becomes entitled to claim the ownership, but will not actually have it

⁸ *Klopper v. Smit*, 9 S. C. 167; Voet, 7:1:13; 36:1:68.

⁹ Voet, 36:1:68.

¹⁰ Voet, 6:1:3, 6.

¹¹ See Book I., Chapter xxii., n. 23.

¹² Act 5, 1884, sec. 19; sub-secs. 11 and 12.

until he has been placed in possession of the means of alienation, that is, until he has received delivery of the movables and transfer of the immovable property included under the fideicommissum.

CHAPTER VIII.

THE ACQUISITION AND EXTINCTION OF OWNERSHIP.

THE essential requisites of the acquisition of ownership are—(1) a person competent to acquire the same, (2) a thing capable of being acquired, either absolutely or, at any rate, by the person by whom it is intended to be acquired, and (3) a lawful mode or manner of acquisition.

Ownership may be acquired either with reference to individual or particular things, or with reference to the whole of a *universitas rerum*. The modes of acquiring ownership are therefore either particular or universal.

Inheritance has, as already shown, ceased as a mode of universal acquisition in the sense in which it was known as such under the Roman law. In this sense it is only represented at the present day by the acceptance of the administration by the executor of the estate of a deceased person. In what manner an heir acquires ownership in property belonging to an estate to which he succeeds will be shown further on.

Another form of universal acquisition is that by which the trustee of an insolvent estate becomes vested with all the property belonging to such estate in trust for the creditors of the same.¹

¹ Ordinance 6, 1843, sec. 48.

Confiscation of property for crime whereby formerly all the property of certain convicted criminals passed to the Crown was abolished as far back as 1778.²

The modes of singular acquisition of ownership are many, but may be reduced to the following heads, namely, *occupation*, *accession*, *delivery*, and *prescription*.³

Occupation is the lawful seizure, taking, or apprehension of that which has never yet been appropriated by any one or which has ceased to belong to any one, that is, of a *res nullius*.⁴ Instances of this mode of acquisition are in a settled state naturally limited in number. The most common at the present day is that of the capture of wild animals, birds, or fish, by hunting, snaring, or fishing, which does not of course apply to animals, birds, or fish which are not *res nullius*, such as domestic animals or domesticated animals and birds, unless indeed these latter have escaped from custody and recovered their former liberty.⁵ But, so long as wild animals have never been captured or domesticated, they may be acquired by capture wherever they may be found, whether on public or private land, on one's own ground or on that of another, and in the latter case whether with or without the owner's consent. For, though a person may expose himself to the penalties provided by Act 36, 1886, sec. 7, for killing, catching capturing, hunting, or shooting at game upon private property without the consent of the owner, and also to an action of damages for trespass, he nevertheless acquires the ownership of any game or other wild animals there

² Placaat, Aug. 10, 1778, promulgated in this Colony on April 22, 1779.

³ Voet, 41: 1: 1.

⁴ G. 2: 4: 32.

⁵ Voet, 41: 1: 3, 7; G. 2: 4: 3-6, 13-17, 24, 25, 29; V. L., vol. 1, p. 157; V. D. L. 116.

captured.⁶ In such action of trespass, however, the Court may under certain circumstances make the value of the animals captured the measure of the damages to be awarded to the owner of the ground.⁷

An exception to the rule here laid down has been made by the Legislature with respect to bees, as regards which it has been enacted that every nest or hive of bees, whether wild or domesticated, which shall be formed or made or kept on private land, together with all the bees and honey and wax that may be contained in any such nest or hive, shall, in the absence of any contract to the contrary, be deemed to be the property of the person occupying such land.⁸

The ownership of persons in domesticated ostriches again has been specially protected by statute and declared to continue even when such birds have strayed or escaped,⁹ and they have been included under the term "cattle" when used in the Cattle Theft Act.¹⁰

Various statutes have further been promulgated in this Colony for the protection of game in general,¹¹ and wild ostriches in particular,¹² and also fish,¹³ and penalties are thereby imposed for the capture of game, wild ostriches, or fish in contravention of the same, but nothing has been enacted as to the ownership of any game, ostriches, or fish illegally captured. Under these circumstances it is submitted that the ordinary rule of the common law with respect to *res nullius*, namely, that they become the property of the first captor or occupier, will apply, and that therefore game,

⁶ *Wright v. Ashton*, 2 Buch. App. C. 240; Voet, 41: 1: 4; G. 2: 4: 9.

⁷ *De Villiers v. Van Zyl*, Foord, 77.

⁸ Act 9, 1869, sec. 1.

⁹ Act 24, 1875.

¹⁰ Act 12, 1885.

¹¹ Act 36, 1886; Act 38, 1891.

¹² Act 33, 1889; Act 30, 1890.

¹³ Act 10, 1867; Act 7, 1883; Act 29, 1890; Act 15, 1893.

ostriches, and fish, though illegally captured, become the property of the captor, because otherwise they would continue to be *res nullius* and belong to no one.¹⁴ Voet and Grotius indeed would seem to be of a different opinion,¹⁵ but their views are based upon the local laws and customs of the Netherlands which vested the right of hunting and fishing in the Counts,¹⁶ whereas with us there is no law or custom vesting these rights in the Government. That the view here submitted is correct is further witnessed by the fact that not only is nothing said in the above-mentioned statutes as to the ownership in wild animals or fish illegally captured, but that confiscation in favour of the Crown is in some cases specially provided for by them,¹⁷ and by the fact that in the matter of the protection of bees it was thought necessary by the Legislature to make special provision as to the ownership in them.¹⁸

Where conflicting claims are made by two persons engaged in one and the same hunt as to the ownership of any particular animal shot or captured, they will have to be settled according to the generally accepted rules of hunting prevailing in the Colony, and, in the absence of such, in accordance with the general rules of our common law and the principles of equity. Thus it has been laid down that where one person starts and even wounds any game, but not so as to bring it down, he acquires no ownership in it, but it may still be captured by another person, who will then acquire the ownership of the same;¹⁹ and it has been decided by the Supreme Court with respect to whale fishing that,

¹⁴ Voet, 41: 1: 4, arg.

¹⁵ Voet, 41: 1: 7; G. 2: 4: 5.

¹⁶ Groen., De Leg., Inst. 2: 1: 12; G. 2: 4: 7, 8, 19-21, 26, 27, etc.

¹⁷ Act 36, 1886, sec. 6; Act 7, 1883, secs. 1 and 3; Act 10, 1867, sec. 2.

¹⁸ Act 9, 1869, sec. 1.

¹⁹ G. 2: 4: 31.

in the absence of any rules or local usages with regard to the ownership of whales which have been caught, the Courts will have to apply the principles and rules of our common law with respect to the acquisition of property in animals *feræ naturæ*, and not any regulations obtaining with regard to similar fisheries in other parts of the world.²⁰ It was further laid down that where one of two whaling parties has so mortally wounded a whale as to render it unable to keep the sea, and has so mastered it as to make it impossible for it to have escaped from such party even without any assistance from the other, the former will be entitled to the whole of such whale as its sole property, to the exclusion of the other party, even though the latter may have voluntarily given assistance unasked. But where assistance has been rendered, and without such assistance the whale may possibly have escaped, each party is entitled to a share in the whale in proportion to the amount of assistance rendered by each, and where it is impossible to estimate the respective values of such assistance, each will be entitled to a half share.²¹

Besides game and fish, other natural objects, such as sea-sand, shells, sea-weed, etc., found cast up on the shore or floating on the sea, may be appropriated by the first occupier, unless there be any statutory provision to the contrary.²²

Akin to property which has never yet been appropriated is property which, having at one time belonged to a particular person, has been abandoned by its owner and become *res nullius* once more, and which may therefore be acquired afresh by the first occupier.²³

²⁰ *Langley v. Muller*, 3 Menzies, 588.

²¹ *Ibid.*

²² Voet, 41: 1: 10; G. 2: 4: 32.

²³ *Sheba Gold Mining Co. v. Vautin, Millbourne & Steers*, 3 S. A. R. 16; Voet, 41: 1: 10; V. D. L. 117.

The intention, however, to abandon must be clear and distinct, for property which has been merely lost remains the property of the original owner,²⁴ and consequently any finder of it who, without assuring himself that it has been really abandoned, appropriates it to his own use, may expose himself to a charge of theft.²⁵ The finder of lost property will therefore do well, in order to avoid any criminal charge, to have the property advertised in the most public manner possible,²⁶ unless, indeed, special provision has been made by statute, as is the case with the Pound laws ;²⁷ but, in the absence of abandonment, the owner may at any time reclaim his property.

Wreck, by which term is meant any portion of a ship lost at sea, or of its cargo, which comes to land, and also all flotsam, jetsam, and lagan, that is to say, all property thrown overboard to lighten a ship, and derelict, that is, a ship abandoned on the high seas and found in or on the shores of the sea or any tidal water,²⁸ used from times of old in the Netherlands to belong to the Counts, or, in other words, to the Crown, the redemption of the same upon payment of costs and charges being readily allowed ;²⁹ indeed, according to some authorities, such property never ceased to belong to the original owner.³⁰ One thing, however, seems clear, that it does not become the property of the finder or salvor,³¹ but will have to be administered in terms of the Maritime Laws of England, to which the reader is referred.

²⁴ *Salvage Association of London v. S. A. Salvage Syndicate*, 22 S. C. 171 ; G. 2 : 4 : 36 ; V. L., vol. 1, p. 171 ; V. D. L. 118, 122.

²⁵ Voet, 41 : 1 : 9 ; Schorer, Note 440.

²⁶ V. D. L. 118.

²⁷ Act 15, 1892 ; Voet, 41 : 1 : 9.

²⁸ 17 & 18 Vict., c. 104 ; G. 2 : 4 :

36.

²⁹ G. 2 : 4 : 36, 37 ; V. D. K., Th. 193-197 ; Schorer, Note 440.

³⁰ Voet, 41 : 1 : 9 ; *Salvage Association of London v. S. A. Salvage Syndicate*, 22 S. C. 171.

³¹ Voet, 41 : 1 : 9 ; G. 2 : 4 : 37 ; V. D. L. 118, 122 ; V. L., vol. 1, p. 165.

Akin to lost property is treasure-trove, which is a deposit of money, bullion, precious stones, etc., hidden in the earth, or elsewhere, at a period beyond the memory of man, and the ownership of which has therefore become lost in obscurity, and the treasure itself therefore becomes *res nullius* once more. Such treasure becomes wholly the property of the finder if found by him in his own ground, or in consecrated ground or a tomb.³² But if it be found by accident on the land of another, it becomes the property of the finder only to the extent of one-half, the other half going to the private owner of the ground or the Government, according as the ground is private or public property.³³ Where, however, such treasure is found on another's ground not accidentally, but as the result of special search and labour, the finder will be bound to restore the whole of the treasure to the owner of the ground, without keeping back any portion of it for himself, being regarded as deserving rather of punishment than of reward for his discovery.³⁴ In this connection a usufructuary is not regarded as in any sense the owner of the ground, and is not therefore entitled to any share in treasure found in it.³⁵

The ownership of mines, metals, or precious stones will depend upon the terms of the title to the land upon which they are found, and of the mining laws on the subject, of which we shall treat later when dealing with the rights of ownership in land.³⁶

The capture of enemies' property and the commandeering or requisitioning of property in time of war

³² G. 2: 4: 38; V. D. K., Th. 198; V. L., vol. 1, p. 173; V. D. L. 118.

³³ Voet, 41: 1: 4; V. D. K., Th. 198; V. D. L. 118. As to the share

of the Government, see Schorer, Note 72.

³⁴ Voet, 41: 1: 11.

³⁵ Voet, 41: 1: 12.

³⁶ See also Voet, 41: 1: 13.

are also modes of acquisition of property by occupation,³⁷ but such property will have to be administered according to the laws of war;³⁸ and in the case of *Ncumata v. Matwa and others*³⁹ it was decided by the Eastern District Courts that a rebel is in the same position as a foreign enemy.

Accession is the process by which one thing accedes or becomes added to or incorporated with another in such a way that it is regarded as forming part and parcel of the latter, and becomes by such process the property of the owner of the same.⁴⁰ It is of various kinds, which may be classed under one or other of three heads, namely, (1) natural accession, which is due to the action of natural causes, or (2) artificial or industrial, which is due to the labour of man, or (3) mixed.⁴¹

Among cases of natural accession may be mentioned the birth of the young of animals,⁴² alluvion, and the formation of islands in rivers, and such like. As instances of industrial accession, may be mentioned *specificatio*, commixture or confusion, building, planting or sowing, writing and painting upon another's paper or canvas or wood, and such like. Under the mixed kinds of accession may be classed the production of fruits, which may be due either simply to the processes of nature alone or to these assisted by the labour of man.

By the natural increase or birth of animals the young of all domestic or domesticated animals become the property of the owner of those animals themselves.⁴³

³⁷ *Alexander v. Pfau*, (1902) T. S. 155; *Mshwakezele v. Guduza*, 18 S. C. 167; G. 2: 4: 34; V. D. K., Th. 191, 192; V. L., vol. 1, p. 171; V. D. L. 118.

³⁸ V. D. L. 118.

³⁹ *Ncumata v. Matwa and others*,

2 E. D. C. 272.

⁴⁰ Voet, 41: 1: 14; G. 2: 9: 1; V. L., vol. 1, pp. 175, 180.

⁴¹ G. 2: 8: 1.

⁴² G. 2: 10: 1.

⁴³ Voet, 41: 1: 15; V. D. L. 119.

Alluvion is the insensible gradual increase or addition made to land abutting upon a river by the natural current of the river and the deposits of soil caused thereby.⁴⁴ Where such alluvion takes place to land which has been granted not by measure or according to certain mathematical boundaries along the river bank, but merely with the river itself as the descriptive boundary, it will be the property of the owners of the land against or in front of which it is formed;⁴⁵ but this will not be the case where the land has been granted by measure or according to certain fixed mathematical boundaries, and the alluvion falls outside such measure or boundaries.⁴⁶

The case is somewhat different where the increase or addition to a riparian property is not made gradually by the deposit or formation of alluvion, but by a piece of the land of one riparian proprietor being forcibly torn from it by the action of the stream and carried away and attached to the land of another. Such increase is not at once acquired by the latter owner, but only after it has become permanently attached to and become one with his land.⁴⁷ Whether it has actually become so attached is a matter of fact which will have to be satisfactorily established by evidence, such as that the trees carried down with the land have struck root into the land to which it is alleged to be attached. When once such attachment has been effected, the displaced piece of land becomes the property of the new proprietor, together with the trees growing thereon; nor will its former owner be entitled to any compensation for the value of the ground or the trees growing

⁴⁴ *Colonial Government v. Town Council of Cape Town*, 19 S. C. 97.

⁴⁵ G. 2: 9: 13; V. L., vol. 1, p. 176; Act 32, 1906, sec. 13.

⁴⁶ Voet, 41: 1: 15; G. 2: 9: 25; V. L., vol. 1, p. 178.

⁴⁷ G. 2: 9: 13.

thereon, though he may claim to remove his ground, or the trees, or anything else that may be affixed thereto, before the attachment is completed.⁴⁸

Analogous to the two above cases is that of the formation of an island in the sea within the territorial waters of the Colony, or in a river. As regards the former, it is submitted that there would be nothing to distinguish such island from any other public lands of the Colony,⁴⁹ and the same, it is submitted, would be the case with an island formed in a tidal river.⁵⁰ The same rule would apply to an island formed in a non-tidal river, opposite to land granted by measure or according to fixed mathematical boundaries, which, it is submitted, would become public property.⁵¹ But where an island is formed opposite to lands which are not limited in extent or by mathematical boundaries, but which have been granted by description as extending up to or being bounded by the river itself, it will be the property of the owners of such lands. If the island is formed in the middle of the river, it will become the property of the owners of the land on either bank, in proportion to the depth or width of their respective lands from the river banks.⁵² If it is formed wholly on one side of the middle line of the river, it will belong wholly to the owners of land abutting on the nearer bank of the river, so much so that if the island is afterwards increased by alluvion so as to extend beyond the middle line of the river, or opposite to the land of an upper or lower proprietor on the same bank, such alluvion will nevertheless belong to the same owner as the island.⁵³

⁴⁸ Voet, 41: 1: 16.

⁵¹ But see Voet, 41: 1: 17.

⁴⁹ But see Voet, 41: 1: 17; G. 2: 9: 15.

⁵² G. 2: 9: 15.

⁵³ Voet, 41: 1: 17.

⁵⁰ V. L., vol. 1, pp. 175, 176.

Voet, however, is of opinion that an island formed in a public river, whether opposite to limited or unlimited lands, ought to belong to the State,⁵⁴ and he holds the same with respect to the deserted bed of a public stream, though according to the Roman law it becomes the property of the riparian proprietors on either bank, in proportion to the respective depth or width of their properties from the banks.⁵⁵

Proceeding to the cases of artificial or industrial accession, the first we have to consider is *specificatio*, which is the production of some new *species* or kind of thing, by working up raw material by means of man's labour in such a way as to make it change its character and to convert it into a new manufactured article.⁵⁶ Such *specificatio* may be made either (1) wholly out of one's own material, or (2) partly out of one's own and partly out of another's, or (3) wholly out of another's.

In the first case, it is almost unnecessary to say that where an article is produced by or for account of the owner of the material the latter will also be the owner of the new product, but that it would be different where under contract the article is made for another who will then be entitled to claim such article from the maker.⁵⁷ In the second case, as where a man makes a garment partly out of his own wool and partly out of that of another, the new thing will belong to the specifier or person who makes it, whether it is capable of being reduced to the original materials again or not.⁵⁸ In the third case, however, where the

⁵⁴ Voet, 41: 1: 17, 18. But see Voet, 1: 8: 9.

⁵⁵ Voet, 41: 1: 18; G. 2: 9: 14. But see Voet, 1: 8: 9.

⁵⁶ Voet, 41: 1: 21; G. 2: 8: 2;

V. L., vol. 1, p. 180; Hunter's Roman Law, 2nd ed., p. 280.

⁵⁷ *Bock v. Winder*, 7 E. D. C., 112.

⁵⁸ Voet, 41: 1: 21.

new article is made entirely out of the material of another, without his consent, we have to inquire whether it can be reduced to the original material again or not. If not, as when wine is made out of another's grapes, the new article will be the property of the specifier; but if it can, as when a goblet has been made out of the gold or silver of another, the new article will belong to the owner of the material.⁵⁹ In none of the above cases will it make any difference as regards the ownership whether the specifier acted *bonâ fide* or not, whether he was under the impression that the material belonged to himself or knew that it belonged to another, though *malâ fides* on his part may possibly expose him to a criminal prosecution.⁶⁰

Somewhat akin to *specificatio* is mixture or confusion, whereby two articles belonging to two different persons become inextricably mixed. In such a case the result of the mixture will be the common property of the two owners in proportion to the share of the material belonging to each, if the mixture has been made with their consent, or if it has taken place accidentally; but if the two materials can be separated, each remains the owner of his own material.⁶¹ Where the materials have become mixed by the action of one owner alone, the mixture will still be the common property of both, whenever things of the same kind have been mixed, such as gold with gold or silver with silver. If the materials are of different kinds, each will remain the owner of his own property, provided the materials can be again separated; but if not, the mixture would seem to

⁵⁹ Voet, 41: 1: 21; G. 2: 8: 3.

⁶¹ Voet, 41: 1: 23; G. 2: 8: 8;

⁶⁰ Voet, 41: 1: 21. But see G. 2: V. L., vol. 1, p. 181.
8: 2 *in fine*, and Schorer, Note 87.

amount to a case of *specificatio*, which would give the ownership of the mixture to the specifier, or person who made the mixture.⁶²

The above have been cases of artificial accession having reference to movables only; we have now to consider the accession of movable to immovable property. The most important of these is the case of accession by building (*inædificatio*) upon land. The general rule is that whatever is built as a fixture upon ground accedes to or becomes part and parcel of the land, according to the motto *omne quod inædificatur solo cedit*, and as such becomes the property of the owner of the ground,⁶³ whether such building has been erected by such owner himself or by another person, and whether it has been erected by a person with his own material on the ground of another or with another's material on his own ground.⁶⁴ The stringency of the above Roman law motto has, however, been tempered in its application by the Roman-Dutch law by another maxim, namely, that "no one should gain profit to the damage and injury of another," and, accordingly, it has been decided that a *bonâ fide* possessor of land—that is, one who is under the *bonâ fide* impression that the land belongs to him, or that he is entitled to the possession of the same—retains his ownership in materials affixed by him to the land of another until he has given up possession of the land and may remove the materials again, if he can do so without any serious damage to the land, unless, indeed, the structure was erected for the necessary protection or preservation of the soil or

⁶² Voet, 41:1:23.

⁶³ O'Reilly v. Zücke, 4 S. C. 103; Barnard v. The Colonial Government, 5 S. C. 122; G. 2:10:6.

⁶⁴ Voet, 41:1:24; G. 2:10:7, 8; V. L., vol. 1, p. 180; Cairncross v. Nortje, 21 S. C. 130.

the buildings thereon, in which case its removal would necessarily imply damage.⁶⁵ A *malâ fide* possessor also may remove his material under similar circumstances before a demand is made upon him by the owner of the ground, but not after such demand, he retaining his ownership in the materials until such demand is made.⁶⁶ In the same way, as between the lessor or lessee, the lessee retains the ownership of materials (other than growing trees) affixed by him to the soil without the lessor's consent during the currency of the lease; but after its expiration he loses the ownership in the materials still remaining affixed to the soil, or which, having been disannexed, have not yet been removed from the ground.⁶⁷

Where a person has built with another person's material on his own ground, and the material afterwards again becomes disannexed from the soil, the owner of the material can reclaim the same by *vindicatio*; but this is not the case with respect to trees which have struck root and have afterwards been taken out again.⁶⁸

In order, however, that there may be this accession of buildings to the ground, it is essential that such buildings should be fixtures and adhere to the soil,^{68a} for if A. erects a movable building made of wood on the ground of B., the building will not belong to the latter.⁶⁹ So also where the lessee of a house used as a shop had put up movable shelving, which was kept in position by hold-fasts driven into the wall, it was decided that the shelving did not accede to

⁶⁵ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359; *Stupart v. Cross*, 22 S. C. 538.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Voet, 41 : 1 : 25.

^{68a} But see further p. 3 above.

⁶⁹ Voet, 41 : 1 : 24; *Cairncross v. Nortje*, 21 S. C. 130.

the house or become the property of the owner of the house.⁷⁰

A difficulty arises where a building is erected not wholly on the ground of another, but is built partly on one's own ground and only encroaches partially on the ground of another. In such a case the owner of the ground encroached on may demand that the encroachment be removed,⁷¹ or that the party making the encroachment shall take transfer of the piece of ground actually occupied by the encroachment and so much of the rest of his ground as is rendered useless to him thereby, and pay to him the value of the ground transferred together with the costs of transfer and a reasonable sum as damages for the trespass and as a *solatium* for the compulsory expropriation of his property.⁷² Where, however, there has been delay in applying for the former remedy, the Court will restrict the party injured to the latter.⁷³

Trees planted and crops sown are exactly in the same position as buildings, that is, they become the property of the owner of the soil, but only when they have become fixtures, that is, when they have struck root and thus become attached to the soil.⁷⁴ Trees growing upon a common boundary are the common property of the owners of the two adjoining properties.⁷⁵

By writing on another's paper, and painting on another's canvas, or wooden tablet or panel, accession is also brought about.⁷⁶ With respect to writing on

⁷⁰ *Abraham v. Isaacs & Co.*, 5 S. C. 183.

⁷¹ *Pike v. Hamilton, Ross & Co.*, 2 Searle, 191.

⁷² *Christie v. Haarhoff and others*, 4 H. C. 349.

⁷³ *Myburgh v. Jamison*, 4 Searle, 8.

⁷⁴ *Consistory of the Dutch Re-*

formed Church, Steytleville v. Village Management Board, 8 S. C. 12; *Louw v. Watermeyer, Trustee of Mostert*, 4 E. D. C. 381; Voet, 41: 1: 25; V. L., vol. 1, p. 180.

⁷⁵ Voet, 41: 1: 25.

⁷⁶ G. 2: 8: 3; Schorer, Note 88; V. L., vol. 1, p. 181.

another's paper, Voet lays it down generally that the paper accedes to the writing, and that the manuscript consequently becomes the property of the writer,⁷⁷ but in the case of a painting he says that the decision of the question will depend on the merits of the painting, and lays it down that the canvas, tablet, or panel will accede to the painting and become the property of the artist, not invariably, but only whenever in the opinion of experts it would be absurd to hold the contrary.⁷⁸

The question as to the ownership of letters written by one person to another was raised in the case of *Nelson and Meurant v. Quin & Co.*,⁷⁹ in which application was made for an interdict restraining the respondents, who were newspaper proprietors, from publishing in their paper certain private letters which had been written by Nelson to Meurant, and which had been produced in Court in a certain judicial inquiry. In giving judgment, De Villiers, C.J., stated that Voet, Groenewegen, and Grotius⁸⁰ held that the doctrine of the Roman law that, "if Titius has written a poem, a history, or an oration on your paper, you, and not Titius, are the owner of the written paper,"⁸¹ does not obtain in the law of Holland, but that not one of them refers to the case of a person multiplying copies of a composition which has come to his knowledge. In the absence of civil law authority, he went on to say, it was proper for our Courts to refer to English decisions with a view to ascertain whether the right contended for by the applicants was recognized in the English Courts as existing independently of statute, and, if so, on what grounds its existence

⁷⁷ Voet, 41 : 1 : 26.

⁷⁸ *Ibid.*

⁷⁹ 4 Buch. 46.

⁸⁰ Voet, 41 : 1 : 26; Groen, De Leg., Inst. 2 : 1 : 33; Grotius, 2 : 8 : 3.

⁸¹ Inst. 2 : 1 : 33.

was based. After examining the English decision,⁸² he came to the conclusion that in none of the English decided cases did the right of property in the letters constitute the sole ground for restraining their publication. In most of them pecuniary loss to the authors was apprehended; in others the publication would amount to a breach of contract, express or implied; and in the last case quoted by him⁸³ the receiver, by returning the letters to the writer, was held to have renounced his right to publish them. In the end he came to the conclusion that, even if there had been English cases in which the right of property *per se* had been the ground of decision, the Court should hesitate before it established in the Colony a precedent fraught with the most mischievous consequences, and refused the interdict.

Again, if one thing is joined to another, by what the Roman lawyers called *adjunctio*, in such a way that they can either not be separated at all or at least not without detriment to one or the other of them, the owner of the principal thing will be the owner also of the accessory. Hence, where one person had lent a wagon to another, who, whilst he had the use of it, supplied the wagon with two new wheels and afterwards returned the wagon to the owner with the new wheels, it was held that the wheels formed part of the wagon and belonged to the owner of the same.⁸⁴ So also where "a person weaves his own gold into another man's cloth or puts a silver lid on to another's jar," the gold and the silver lid will become the property of the owner of the cloth and of the jar respectively.⁸⁵

⁸² *Boosey v. Jeffreys*, H. of L. C., vol. 4, p. 936; *Pope v. Curl*, 2 Atkyns, 342; *Thompson v. Stanhope*, Amb. 737; *A. v. Eaton*, 2 Ves. & B. 27; *Lord Percival v. Phipps*, 2 Ves. & B. 19; *Gee v.*

Pritchard, 2 Swanst. 402-427.

⁸³ *Gee v. Pritchard*, 2 Swanst. 402-427.

⁸⁴ *Cooper v. Jordan*, 4 E. D. C. 181.

⁸⁵ G. 2 : 10 : 4.

Of accession which is of a mixed character, that is, partly natural and partly industrial, there is only one comprehensive class, namely, the perception or enjoyment of fruits.

Fruits are classed under three heads, namely, (1) *natural* fruits, which are the natural products of the earth unassisted by man's labour or skill ; (2) *industrial* fruits, which are those products of the earth which are produced with the aid of man's skill and labour, such as the fruit of domesticated fruit trees and sown crops ; and (3) *civil* fruits, that is, such as owe nothing to nature, but are the creatures of purely legal institutions and arithmetical calculations, such as rents and interest.⁸⁶ With respect to fruits of the first two kinds, it may be premised that, until they have been severed from the soil, picked or gathered in the case of garden fruit, or reaped in the case of grass or sown crops, they are regarded as forming part of the soil upon which they are growing,⁸⁷ and, when severed from the soil by the owner thereof, it is almost unnecessary to say that they remain his property.⁸⁸ Any difficulty which may be connected with the ownership of such fruits will only arise when they are gathered by some one other than the owner of the soil without the consent of the latter. The case of those who have gathered fruits under and by virtue of a right granted to them by the owner of the ground, such as a usufructuary, a lessee, or a pledgee or mortgage creditor who has the right of *antichresis*, will be considered each in its proper place. We shall deal here merely with the case of those persons who are in possession of ground either *bonâ fide* or *malâ fide* without the consent of its owner.

⁸⁶ Voet, 14 : 1 : 28.

⁸⁷ *Ibid.*

⁸⁸ Voet, 41 : 1 : 28 ; V. D. L. 118.

The *malâ fide* possessor who gathers the fruits of another's property, whether they be natural, industrial, or civil, does not acquire the ownership of such fruits, but is bound to return the property itself to its owner, together with all the fruits, not only those which have been gathered or recovered and are still in existence but also those which have been consumed by him, and even those which the owner might have gathered but which he himself has neglected to gather.⁸⁹ To this last rule, however, there is an exception in the case of interest which is due but has still to be recovered, and which therefore cannot be recovered without some risk to the capital put out at interest. If also interest has actually been recovered by a *malâ fide* possessor, it will have to be paid over to the owner of the capital only if the latter is prepared to take over the risk of the investment, as it is only fair that the person who bears the risk should also be entitled to the interest.⁹⁰

A *bonâ fide* possessor acquires all the fruits gathered by him before the *litis contestatio*, that is, before the closing of the pleadings⁹¹ in an action with reference to the possession or ownership of the ground, whether they have been already consumed or are still in existence;⁹² but he is bound to restore to the owner of the property all fruits actually gathered by him after the *litis contestatio*,⁹³ because by the *litis contestatio* a *bonâ fide* possessor becomes converted into a *malâ fide* possessor.⁹⁴ He is even liable for the fruits which he might have gathered after the *litis contestatio*, but negligently omitted to gather.⁹⁵

⁸⁹ Voet, 41: 1: 28, 33; G. 2: 6: 3; V. L., vol. 1, p. 184; V. D. L. 121.

⁹⁰ Voet, 41: 1: 28, 23.

⁹¹ *Executors of Meyer v. Gericke*, Foord, 18.

⁹² Voet, 6: 1: 38.

⁹³ G. 2: 6: 2, 3; Schorer, Note 78; V. L., vol. 1, p. 183.

⁹⁴ Schorer, Note 79.

⁹⁵ Voet, 41: 1: 29, 33.

Where a possession has been *bonâ fide* up to a certain point and then become *malâ fide* through the possessor coming to know that he was not entitled to the possession, he will only acquire the fruits gathered by him before such date.⁹⁶

In all the above cases, in which accession is due to the action of man, it is almost unnecessary to state that, in the absence of *malâ fides* on the part of the person causing the accession, the person, who by the accession loses property or the results of labour, must be compensated by the person who acquires or has the benefit of the same.⁹⁷ A specifier, for instance, if he acted *bonâ fide* in making the *specificatio*, is merely liable to an action of damages for his carelessness and negligence in having made use of property not his own, but, if he acted *malâ fide*, may at the same time be liable to be prosecuted for theft.⁹⁸ The same is the case also where a person writes or paints on the paper, canvas, or wood of another and claims the ownership of the manuscript or painting,⁹⁹ and where a person builds with another's material or plants another's trees or sows another's seed on his own ground.¹⁰⁰

But where a person has built with his own material, or planted his own trees, or sown his own seed, or made other improvements, at his own expense, or by means of his own labour, on the land of another, his right to compensation for his loss of his material or expense or labour will, according to some writers, depend upon whether he was at the time in *bonâ fide* or *malâ fide* possession of the land. According to De Villiers, C.J., all the Roman-Dutch authorities are agreed that,

⁹⁶ Voet, 41: 1: 31.

2, *in fine*.

⁹⁷ Voet, 47: 3: 2, *in fine*; G. 2: 8: 4; V. L., vol. 1, p. 181.

⁹⁹ Voet, 41: 1: 26.

⁹⁸ Voet, 41: 1: 21; Voet, 47: 3:

¹⁰⁰ Voet, 41: 1: 24; 6: 1: 29.

where a *bonâ fide* occupier has built upon land belonging to another, he is entitled to the *useful* expenses incurred by him.¹⁰¹ As regards the *malâ fide* possessor, there would seem to be a difference of opinion amongst the Roman-Dutch writers, Groenewegen, Van Leeuwen, Voet, and Schorer holding that a *malâ fide* possessor was in the same position as regards compensation as a *bonâ fide* possessor, that is to say, that he was entitled to recover his useful expenses,¹⁰² and Grotius and Van der Keessel holding that he was entitled to his *necessary* expenses only, by which latter term they would seem to have meant expenses incurred on works which were absolutely necessary for the protection or preservation of the property.¹⁰³ The Courts of the Colony have adopted the view of the former of these sets of writers, and have decided that even a *malâ fide* possessor is entitled to recover the useful expenses incurred by him upon the land occupied by him.¹⁰⁴

By useful expenses is meant the amount or value of the money and labour expended on the property, but only to the extent to which the value of the land has been permanently enhanced by the building or other improvement.¹⁰⁵ That is to say, the possessor will be entitled to claim the difference between the value of the land with and the value of the land

¹⁰¹ *Bellingham and another v. Bloometje*, 4 Buch. 36. See also *Parkin v. Parkin*, 2 Buch. 136; *De Beer's Consolidated Mines v. The London and South African Exploration Co.*, 10 S. C. 359; *Lind and others v. Calitz and others*, 9 S. C. 268; Schorer, Note 66; V. D. K., Th. 212.

¹⁰² Groen, De Leg., Inst., 2: 1: 30; Voet, 6: 1: 36; 5: 3: 21; 41: 1: 25; V. L., C. F., part 1: 2: 11:

7, 8; Schorer, Note 92.

¹⁰³ G. 2: 10: 8; V. D. K. Th. 214; Schorer, Note 66.

¹⁰⁴ *Bellingham v. Bloometje*, 4 Buch. 36; *De Beer's Consolidated Mines v. The London and South African Exploration Co.*, 10 S. C. 359; *Colonial Government v. Smith & Co.*, 18 S. C. 392.

¹⁰⁵ *Bellingham v. Bloometje*, 4 Buch. 36; Voet, 6: 1: 36.

without the improvements, in so far as it does not exceed what he has actually expended.¹⁰⁶

Whenever a possessor is entitled to compensation, his claim will lie not only against the owner, but even against a mortgagee whose bond was in existence at the time the improvements were made.¹⁰⁷

For the recovery of such compensation a *bonâ fide* possessor is entitled not only to a right of action, but also to a lien or right of retention of the land until his claim has been satisfied.¹⁰⁸ He is not bound, however, to adopt either one course or the other, for both a *bonâ fide* and a *malâ fide* possessor are entitled, if the owner of the ground refuses to pay the useful expenses, to remove the improvements made by him, in so far as this can be done without any material detriment to the condition in which the land was before the improvements were made.¹⁰⁹

A *malâ fide* possessor is in the position of a spoliator, who is bound before all things to restore that which he has obtained by spoliation, and therefore is not entitled to a right of retention, but is bound to restore the land before the question of compensation can be raised by him; but if the owner of the ground has stood by and allowed the building to proceed without any notice of his own claim, the *malâ fide* possessor will, through the fraud of the owner, be placed in the same position as a *bonâ fide* possessor, and entitled to the same rights of retention.¹¹⁰ On the other hand, the

¹⁰⁶ *South African Association v. Van Staden*, 9 S. C. 95.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Bellingham v. Bloommetje*, 4 Buch. 36; *Barnard v. Colonial Government*, 5 S. C. 122; Voet, 41: 1: 25; 5: 3: 23; Schorer, Note 66.

¹⁰⁹ *Barnard v. Colonial Govern-*

ment, 5 S. C. 122; *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359; Voet, 6: 1: 36.

¹¹⁰ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

possessor's right to compensation and right of retention will lapse if, having notice of an intended sale of the land, he stands by without protesting and allows the sale to go through without giving the purchaser notice of his claim, unless, indeed, the purchaser were aware of it.¹¹¹ This is especially so in the case of a sale in execution.¹¹²

The right to compensation may also be waived, and this is considered as tacitly done if the possessor restores the property to its owner without claiming compensation.¹¹³

As regards the fruits gathered by the *bonâ fide* possessor before the *litis contestatio*, it should here be added that, though these became the property of such possessor, this will not prevent their being set-off in reduction of any claim he may set up to compensation for improvements.¹¹⁴ And it is only fair also that any quit-rent or other rent-charges or rates due upon the land should be allowed in reduction of any such claim.¹¹⁵

A lessee, as already shown, is not a possessor in the strict Roman-law sense of the term, and stands on a different footing in regard to improvements from the ordinary possessor; but it may be as well to consider here what claim he has to compensation for improvements made by him during the currency of the lease. The law on this subject was laid down by the States of Holland and West Friesland in a Placaat of September 26, 1658, at least as regards agricultural lands, but it has been extended by our Courts also to urban tenements.¹¹⁶ In the first place it may be stated generally that a lessee has in no case the right of

¹¹¹ *Lind and others v. Calitz and others*, 9 S. C. 268.

¹¹² *South African Association v. Van Staden*, 9 S. C. 95.

¹¹³ Voet, 39: 5: 5.

¹¹⁴ Voet, 41: 1: 32; 6: 1: 38, 39.

¹¹⁵ Voet, 41: 1: 32.

¹¹⁶ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

retaining or remaining in possession of the land leased after the expiration of the lease;¹¹⁷ but if the improvements have been made with the consent of the owner, he will be entitled to a tacit hypothecation for the value of the materials even after giving up possession.¹¹⁸ His right to compensation will depend upon whether the improvements were made with or without the consent of the owner. In the former case the Placaat provides¹¹⁹ that the owner shall, at the expiration of the lease, be bound to pay the lessee or his heirs compensation for such buildings as shall have been erected on the land with his consent, as well as for the sown lands, and that for the purposes of such compensation the value of the bare material shall be taken "without sand, lime, or wages."¹²⁰ As regards trees planted by the lessee with the owner's consent, the lessee was only entitled to the mere cost of the trees at the time of planting.¹²¹

For improvements made without the consent of the owner the lessee was not entitled after the expiration of the lease to any compensation,¹²² though he would under the common law be entitled to recover any *necessary* expenses incurred by him for the protection and preservation of the property. As far as improvements or *useful* expenses are concerned, the only remedy the lessee has is to remove the materials from the land before the expiration of the lease, in so far as this can be done without any material injury to the ground, for, if he fails to do so, the improvements

¹¹⁷ *Barnard v. Colonial Government*, 5 S. C. 126.

¹¹⁸ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

¹¹⁹ Placaat, Sept. 26, 1658, sec. 10.

¹²⁰ Placaat, sec. 11; *De Beer's Consolidated Mines v. London and*

South African Exploration Co., 10 S. C. 359.

¹²¹ Placaat, sec. 13; *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

¹²² Placaat, sec. 12.

will become the property of the owner of the ground, free from any liability to the lessee.¹²³ Trees, however, planted by the lessee without the owner's consent, it would appear that he is not entitled to remove, they having derived nourishment from the soil, and thus become the absolute property of the owner of the soil.¹²⁴

Ownership, when once legally acquired, may again become lost in various ways. This may happen either with or without the consent of the owner. Ownership may become lost with the consent of the owner either by mere abandonment without any transfer to another person, or by such transfer according to law.¹²⁵ Without such consent ownership will become extinguished by the total destruction of the thing, or the escape of domesticated wild animals from custody as above mentioned.¹²⁶ It may further become lost by the action of another person in any one of the ways in which the property of another may be acquired without his consent, according to the principles above laid down, that is to say, by artificial accession and prescription. It may further be lost by means of expropriation on behalf of the Crown in terms of the statutes bearing upon the subject,¹²⁷ mere confiscation of property

¹²³ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359; *Barnard v. Colonial Government*, 5 S. C. 126; *Placaat*, sec. 12.

¹²⁴ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

¹²⁵ V. D. L. 122.

¹²⁶ See p. 36, above.

¹²⁷ G. 2: 33: 2 *in fine*; Schorer, Note 65; Act 9, 1858, secs. 11 and 12; Act 19, 1874, sec. 3; Act 6, 1882. For decided cases on expropriation, see *Du Plessis v. Wilkinson*, 7 Buch. 28; *De Villiers v. Cape Divisional Council*, 5 Buch. 50, and 6 Buch. 105; *Slabber*

v. Bell, 4 Searle 3; *Landmark v. Van de Walt*, 3 S. C. 300; *Kimberley Divisional Council v. London and South African Exploration Co.*, 2 Buch., App. C. 84; *Town Council, Cape Town v. Commissioner of Crown Lands*, 6 Foord, 21; *Trustee of Kimberley Public Gardens v. Colonial Government*, 5 S. C. 316; *MacDonald v. District Engineer of the Midland and North Eastern Railway*, 7 S. C. 290; *Clayton v. Metropolitan and Suburban Railway Co.*, 10 S. C. 16; *Davison v. Railway Department*, 17 S. C. 297; *Grimbeeck v. Colonial Government*, 17 S. C. 200; *Ferguson v. Faviell*, 1 Buch. E. D. C.

having been abolished in this Colony,¹²⁸ or by virtue of the decree of some competent Court. Such decree may consist either in a judgment specifically assigning certain property to one of two parties in a contested suit,¹²⁹ or in the sequestration of a debtor's estate as insolvent,¹³⁰ or in a judicial sale, or sale in execution of a judgment of the Court.¹³¹

CHAPTER IX.

THE TRANSFER OF OWNERSHIP.

THE most important of the modes of acquiring ownership in a settled state of society is naturally the transfer of the ownership by one person to another, that is, of "the right of disposing of a corporeal thing, coupled with the right to claim the possession and enjoyment thereof." Such transfer will be completed as soon as the right to dispose of or alienate the thing has passed from the transferror to the transferee or receiver, though the latter may not have been placed in the actual possession or enjoyment of the thing. Whether such transfer will entitle the transferee to demand the possession or enjoyment of the thing from

211; *Berry v. Divisional Council of Port Elizabeth*, 1 Buch. App. C. 241; *W. Scallan v. G. P. Gnodde*, 1 Off. Rep. 287; *Wynberg Valley Railway Co. v. Eksteen*, 1 Roscoe, 70; *Executors of Pillans v. Wynberg Valley Railway Co.*, 1 Roscoe 85; *Town Council of Cape Town v. Commissioner of Crown Lands and another*, 1 Foord 21; *Colonial Government v. Gertenbach's Executors*, 14 S. C. 51; *Gillet v. Colonial Government*, 14 S. C. 185; *Logan v. Colonial Government*, 18 S. C. 125; *Town Council*

of Cape Town v. Table Bay Harbour Board, 17 S. C. 117; *Cape Divisional Council v. Colonial Government*, 20 S. C. 87; *Heathcote v. Colonial Government*, 20 S. C. 50.

¹²⁸ Proclamation, Aug. 10, 1778, published in this Colony on April 22, 1779.

¹²⁹ G. 2: 33: 7; Schorer, Note 68.

¹³⁰ Ord. 6, 1843, sec. 46, 49.

¹³¹ *Lange and others v. Liesching and others*, Foord, 59; Voet, 6: 1: 13; 20: 4: 15; V. D. L. 122.

the transferror will depend upon the *causa* or grounds upon which the transfer has been made; but it will certainly entitle him to enforce his rights of possession and enjoyment against any third party who may be in possession of the thing, or who may interfere with his possession or enjoyment thereof, subject only to any real obligations which may have been imposed upon the property by any previous owner thereof, and to the consequent real rights over the property which may be vested in such third party.

In order to effect a valid transfer of ownership, the following essentials are required by our law¹ :—

(1) That the thing, the ownership in which is to be transferred, be capable of being owned.²

(2) That the transferror be the owner of the thing, or be in a position or have authority to dispose of the ownership.³

(3) An intention on the part of the transferror to transfer the ownership to the transferee.

(4) An acceptance on the part of the transferee.

(5) A *justa causa* or legal consideration for the transfer.

(6) A delivery or transfer of the property according to law.

A further qualification was formerly required, namely, that the transferee should be competent to acquire the property to be transferred, for the clergy and ecclesiastical institutions were in early times forbidden to acquire immovable property,⁴ and even in this Colony there appears to have been some difficulty in this

¹ Voet, 41 : 1 : 35.

² Voet, 6 : 1 : 29.

³ *Petition of the Kuils River*

Public School Committee, 22 S. C. 243.

⁴ G. 2 : 5 : 7.

respect with regard to foreigners;⁵ but these impediments in the way of ownership have become obsolete.

Upon the second of the above requisites it is almost unnecessary to remark that a delivery made by a person who is not the owner, nor authorized by express mandate or authority to act for the owner is ineffectual to pass the ownership,⁶ but if the transferor should afterwards acquire the ownership, such ownership will at once vest in the transferee.⁷

The owner, therefore, of property, movable as well as immovable, which has been alienated without his consent, not only by one who has stolen it, but even by one to whom it has been lent or let or given in deposit, or by any other person not having a mandate or authority from him to alienate the same, may legally claim it from any one who is in possession of it.⁸

A thief, therefore, cannot by delivery pass a valid title to property stolen by him even to a *bonâ fide* purchaser for value without any knowledge of the theft; and as no one can transfer to another any greater right than he has himself, it follows that the person to whom a thief has delivered stolen property is no more competent to pass a valid title to it than the thief himself.⁹ Consequently the owner may recover such property from any possessor, whether *bonâ fide* or *malâ fide*, without refunding the price, even if the possession be *bonâ fide*.¹⁰ But where a *bonâ fide*

⁵ *Assue v. Curator of Assue*, 2 Menzies, 148.

⁶ *Beyers v. McKenzie*, Foord, 125; *Perrin v. Turton*, Kotze, 25; *Kirstein v. Nellmapius*, Kotze, 21; Voet, 6: 1: 5, 12; 41: 1: 35.

⁷ Voet, 21: 3: 1.

⁸ *Kotze v. Prins*, 20 S. C. 156; *De Hart v. De Jongh*, (1903) T. S. 260; *Martin & McElvey v. Savory*,

(1904) T. S. 180; V. D. K., Th. 163.

⁹ *Van der Merwe v. Webb*, 3 E. D. C. 97; *Woodhead, Plant & Co. v. Gunn*, 11 S. C. 4; *Rees v. Jackson and Blyth*, 1 Off. Rep. 285; *Kitchen v. Ströbel*, 8 Buch. 125; *Muller v. Chadwick & Co.*, (1906) T. S. 20; Voet, 6: 1: 7.

¹⁰ Voet, 6: 1: 7 *et seq.*; G. 2: 3:

possessor has in good faith sold the stolen property, the owner will not be entitled to recover from him the price paid for the same,^{10a} though Schorer is of opinion that the possessor would be liable to the extent of any profit he may have made out of the transaction.¹¹ The owner will, however, have his action for the recovery of the thing or its value as well against the thief himself as against a *malâ fide* possessor who has lost possession of the same.¹²

The owner of stolen money will not be entitled to the ownership of property purchased by the thief therewith.¹³

An exception to this rule has been introduced by statute in favour of pawnbrokers who may give a valid title to things pledged to them, provided these have been sold by them in accordance with the provisions of the Pawnbrokers Act of 1889.¹⁴

Another exception obtains with respect to stolen money, the ownership in which a thief may validly pass to a person who receives it *bonâ fide* for value, the currency of the coin of the realm being quite incompatible with the right of an owner to follow stolen money into the hands of third parties who have honestly received the same for value.¹⁵ The same rule applies to bank-notes and other negotiable instruments which have been reduced into such a state that the

5; Schorer, Notes 66, 334; V. D. K., Th. 183; V. L., vol. 1, pp. 191, 192. See also Voet, 6: 1: 14, as to property obtained by fraud.

^{10a} *Leal & Co. v. Williams*, (1906) T. S. 558.

¹¹ Schorer, Note, 67.

¹² Voet, 6: 1: 10; *Myers Brothers v. Morgan and another*, 22 S. C. 492; *Leal & Co. v. Williams*, (1906) T. S. 558.

¹³ *Liquidators of the Cape of Good Hope Bank v. De Beer's Mines and another*, 11 S. C. 450.

¹⁴ Act 36, 1889. See also Voet, 6: 1: 7; V. D. K. Th. 184; G. 2: 3: 6; V. L., vol. 1, p. 192; *Muller v. Chadwick & Co.*, (1906) T. S. 30.

¹⁵ *Woodhead, Plant & Co. v. Gunn*, 11 S. C. 4; Voet, 6: 1: 8, 11.

Whether the owner of stolen money has any preferent claim to property which has been bought with it by the thief would seem to be doubtful, there being authorities both for and against (Schorer, Note 67 *in fine*).

maker can be sued thereon by any *bond fide* holder and which are by commercial usage treated as cash.¹⁶ Both in this case, however, and in that of current coin, the rule would be different if the receiver knew that the negotiable instrument or the money was stolen,¹⁷ or that the negotiable instrument had been given in payment of the purchase price of stolen property.¹⁸ Share certificates in a mining company endorsed in blank are not negotiable instruments, and therefore a good title to them cannot be passed by a thief.¹⁹

A further exception was made by the customs of the Netherlands in favour of sales at market overt, that is to say, at the free markets or great public fairs,²⁰ with respect to which it was held that the possessor was entitled to be refunded by the owner the price paid by him at such market, if he could not recover the same from the seller.²¹ In this Colony, it is submitted, there are no market overt except pound sales. It has, at any rate, been decided that municipal markets and auction sales are not such.²²

Proceeding to the third requisite of transfer, an intention to transfer the ownership is absolutely essential, the most complete transfer or delivery of the thing having no effect to pass the ownership unless the intention be present.²³ Such intention will be vitiated in any one of the ways in which intention

¹⁶ *Woodhead, Plant & Co. v. Gunn*, 11 S. C. 4; *United South African Association v. Cohn*, (1904) T. S. 738.

¹⁷ *York v. Van der Linden*, 1 Roscoe, 337.

¹⁸ *Peddie v. Cohen*, 5 E. D. C. 59.

¹⁹ *Van Blommestein v. Holliday*, 21 S. C. 17.

²⁰ Voet, 6: 1: 8; V. L., vol. 1, pp. 187, 192.

²¹ G. 2: 3: 6; V. D. K., Th. 184;

Schorer, Note 67.

²² *Van der Merwe v. Webb*, 3 E. D. C. 97; *Woodhead, Plant & Co. v. Gunn*, 11 S. C. 4. But see *Retief v. Hamerslach*, 1 S. Af. Rep. 171. and 1 Cape L. J. 348; *Kitchen v. Sträbel*, 8 Buch. 125.

²³ *Kriege v. Trustees of the South African Bank and others*, 2 S. C. 130; *Preston & Dixon v. Biden's Trustee*, 1 Buch. App. C. 322.

is vitiated in the case of contracts. Any delivery, therefore, made by a minor or person under curatorship without the consent of guardian or curator will be void,²⁴ and so will an alienation made by an insolvent of any portion of his estate after the making of the order for the sequestration of the same.²⁵

The same will be the case where the person making the delivery has made a mistake as to the thing he is delivering, as where, under a mandate to deliver a thing belonging to another person, he by mistake delivers something belonging to himself, unless he has made himself personally liable by such delivery in accordance with some other principle of law unconnected with delivery as such.²⁶

In the contract of purchase and sale the intention to transfer the ownership is not necessarily to be presumed from the mere fact of delivery.²⁷ It is essential to pass the ownership that the price should have been paid, or security accepted, or credit given for the same²⁸ (in which respect our law differs from the law of England and of Scotland),²⁹ and where there are no circumstances to show that a sale was intended to be on credit, it must be presumed to have been for cash.³⁰ Much less will the ownership pass where there has been an express stipulation that the goods are to remain the property of the seller till they have been paid for,³¹ or where credit has been given on the

²⁴ Voet, 41: 1: 35; G. 2: 5: 3; V. L., vol. 1, p. 193.

²⁵ Ord. 6, 1843, secs. 46, 49. See also G. 2: 5: 3; V. D. K., Th. 199; Schorer, Note 73.

²⁶ Voet, 41: 1: 37.

²⁷ V. D. K., Th. 203; Schorer, Note 77; V. L., vol. 2, p. 133; Vinnius, Inst. 2: 1: 41.

²⁸ Voet, 41: 1: 35; 6: 1: 14, 15;

19: 1: 11; G. 2: 5: 14; V. L., vol. 1, p. 186.

²⁹ *Daniels v. Cooper*, 1 E. D. C. 179-181; *Kellar's Trustee v. Edmeades*, 3 S. C. 25.

³⁰ *Daniels v. Cooper*, 1 E. D. C. 174. See also *Friis v. British United Diamond Co.*, 7 S. C. 17; 5 H. C. 270.

³¹ *Daniels v. Cooper*, 1 E. D. C.

condition that a promissory note be given for the price.³² But where the sale was for a price "*to be paid for* by a bond payable at a three-years' date" and the goods were delivered without the bond having been passed, and the purchaser thereafter went insolvent, it was held that the sale was a sale on credit, evidently because the words "*to be paid for by*" meant no more than "*to be secured by,*" and that consequently the ownership in the goods had passed to the insolvent.³³ The same was held where it was agreed that the price was to be paid within twelve months, and that in the event of the purchaser failing to pay the amount within the time, the seller should have the right of reclaiming the property sold, although it was agreed at the same time that the purchaser was not to be entitled to dispose of the property in any way, but that it was to remain as security for the debt.³⁴

The fourth essential is that there must be an acceptance on the part of the transferee, so that there may be two concurring minds between the persons concerned in the transfer and a consent on both sides to the transfer of the ownership of the particular thing.³⁵ If there is any difference of opinion as to the thing which is being delivered and accepted, the delivery will be void for want of the necessary consensus.

There must further be a *causa* or legal cause or consideration for the transfer of the ownership, for

174; *Fazi Booy v. Short*, 2 E. D. C. 301; *Van der Merwe v. Rex*, (1905) T. S. 1.

³² *Willson & Co., v. Webster*, 1 Cape L. J. 117.

³³ *Commissioner for the Sequestra-*

tor v. Vos, 1 Menzies, 286.

³⁴ *Keyter v. Barry's Executor*, 9 Buch. 175.

³⁵ Voet, 41: 1: 35; *Greenshields v. Chisholm*, 3 S. C. 227.

the mere transfer without some other legal ground for the same, such as a sale, exchange, donation, or the like, will not vest the ownership in the transferee.³⁶ Hence, where certain claims in a diamond mine had been sold to B., who was acting for P., a foreign principal, and the sellers refused to transfer to P., as the price had not yet been paid, but proposed to transfer to P., *q.q.*, but the Registrar refused to pass the transfer in that form, and the registration was thereupon made in the name of B. simply, without any qualification, it was held that B. had no ownership in the claims, which could upon his insolvency vest in the trustee of his estate.³⁷ Again, in a case which occurred in 1844, where property had been transferred to A. "as father and natural guardian of and in trust for his minor son B.," but it appeared from the evidence that the ground had been bought by A. for himself and had been paid for by him, and that the only reason why the transfer had been made in the form stated was because A. was a native of China, and that consequently no transfer could be made to him in his own name, as he had not yet obtained a deed of burghership, which would seem to have been essential at that time, the Court, upon the application of A. after he had obtained a deed of burghership, ordered the transfer to B. to be cancelled and the transfer registered in the name of A. on the ground that, as between A. and B., the latter was never intended to have, and had not, any beneficial interest in the land in question.³⁸

³⁶ *Preston & Dixon v. Biden's Trustee*, 1 Buch. App. C. 347; *Coaton v. Alexander*, 9 Buch. 19; Voet, 41: 1: 35; 4: 3: 3; G. 2: 5: 2; 3: 30: 12. But see *Lucas' Trustee v. Ismail & Amod*, (1905)

T. S. 239.

³⁷ *Preston & Dixon v. Biden's Trustee*, 1 Buch. App. C. 347.

³⁸ *Assue v. Curator of Assue*, 2 Menzies, 148.

Again, where a person had falsely and fraudulently represented himself as buying horses for the Government, and had thus obtained delivery of certain horses which he purported to buy for the Government, it was held that there was no sale to the Government, as it had given no authority to buy, and that there was no sale to the person purporting to buy, as the seller had not contracted with him personally ; and consequently there was no sale at all, and the delivery was void for want of *causa* or consideration.³⁹

A disagreement between the parties as to the nature of the *causa* or consideration will not, however, invalidate the transfer, provided both are agreed as to the thing, and provided that the passing of the ownership will be equally effectual under either of these causes or considerations, as where the transferror thinks he is making a donation, whilst the transferee or receiver is under the impression that he is receiving payment of a debt.⁴⁰

Lastly, it is essential that there be a transfer (*traditio*) of the thing in the manner required by law, using the term transfer in a generic sense as including both the delivery of movables and the transfer of immovable property, to which latter more restricted sense the term transfer is most usually confined.⁴¹

Delivery in this connection is the handing over of the possession of a movable thing in any of the ways in which the possession of a movable can be transferred,⁴² with the intention of at the same time passing the ownership, whilst transfer is the written cession of the ownership of immovable property or land in accordance with certain statutory forms.

³⁹ *Beyers v. McKenzie*, Foord, 125.

⁴⁰ Voet, 41: 1: 36; G. 2: 5: 2.

⁴¹ G. 2: 5: 2.

⁴² See p. 21, above. See also Voet, 41: 1: 34.

CHAPTER X.

THE MODES OF TRANSFER AND DELIVERY.

THE modes in which the delivery or transfer of the possession of movables may be legally and validly effected have been already sufficiently discussed. We have here merely to add that delivery in one or other of the said modes is absolutely essential to the valid transfer of the ownership, since any amount of intention to transfer it, if unaccompanied by something which is in law regarded as equivalent to delivery, will not pass the ownership;¹ but, provided the intention be present, the ownership will pass as soon as the delivery or transfer of possession is completed. Thus the delivery was held to have been completed where a bidder at a sale by auction, after certain mules had been knocked down to him, had separated them from the rest of the troop that was being sold and taken possession of them, though they had afterwards accidentally again got mixed with the troop.²

Again, where in an agreement between the Government and certain railway contractors it was provided that all plant, material, etc., brought or left by the latter upon the site of the works, for the purposes of the construction of a railway and other works, should become the property of the Government, it was held that the ownership in such plant, material,

¹ *Robertson v. The Sequestrator*, 1 Menzies, 349; *Lean's Trustee v. Cerruti*, 2 Buch. 313; *Clarke v. Bradfield*, 6 E. D. C. 238; *Mills & Sons v. Trustees of Benjamin*, 6 Buch. 120; *Orson v. Reynolds*, 2 Buch. App. C. 102 and 3 H. C. 219; *Truter v. Joubert's Trustee*, 16 S. C.

375; *Crockett v. Lezard*, (1903) T. S. 592; *Pinkus v. Fenster*, 22 S. C. 58; *Trustees of Wiarda v. Gumpert*, 6 E. D. C. 264; *Siffmann v. Deputy Sheriff of Heidelberg*, (1906) T. S. 571; V. L., vol. 1, p. 185.

² *Kirstein v. Nellmapius*, 1 S. Af. Rep. 21.

etc., vested in the Government immediately upon their being brought on to the works, and were not executable at suit of the creditors of the contractors.³

The object of the rule as to delivery is to prevent innocent persons from being misled by seeing property, purporting to have been delivered, still in the possession of the transferrer, and being thereby induced to give credit to the latter; and it is further provided for the protection of creditors that the delivery must not only be actual, but also that it must be *bonâ fide*.⁴

Hence, where the delivery consisted in a neighbour being called into the stable of a seller, where he found the purchaser, who said to him in the presence of the seller, "There stand eight horses with their harness, and a covered wagon standing before the door, and a cart which has gone out to the country, and these I have bought from Mr. Bam" (the seller); "but I have let them to Mr. Bam again," to which the seller assented, adding, "I am now satisfied; I have now sold my things, and, if anybody should now sue me, they will get nothing": the Court held that the ownership had not passed to the purchaser, as there had not been such a *bonâ fide* sale and real and *bonâ fide* delivery of the articles by the seller to the purchaser as was in law sufficient to divest the seller of the right of ownership in them. At the trial it appeared that a formal deed of sale had been entered into between the parties, in which the seller purported to have sold and delivered the articles to the purchaser

³ *Dunell, Eben & Co. v. Colonial Government*, 4 H. C. 48; *Verwey, N. O., v. Malcomess & Co.*, 9 Cape L. J. 178.

⁴ *Fivaz v. Boswell*, 1 Searle, 235;

Corbridge's Trustees v. Haybittal, N. O., 2 Cape L. J. 220; *Fenton v. Boyle & Co.*, 2 H. C. 575; *Le Rich v. Van der Heuvel*, 4 H. C. 395.

and to have received payment for the same, but it was further agreed that the purchaser should let the property to the seller for four months at a monthly rental, and that the seller should have the right of repurchasing it within that period at the same price.⁵ The same was held where the goods purporting to be delivered were left in the same house in which they had been before the sale and delivery in charge of the concubine of the seller, but without any special agreement between her and the purchaser constituting her the agent of the latter, the proceedings between the parties being in addition tainted with fraud throughout.⁶

It is not necessary that the delivery should take place at the same time as the agreement forming the *causa* or consideration for the transfer of the ownership, provided only that it be effected before any other person has acquired any real right to the property. Hence, where there had been a *bonâ fide* sale and the purchase price had been duly paid, but the property was left in the hands of the seller for some time, and the delivery only made shortly before a judgment had been obtained by a creditor against the seller, it was held that the property had vested in the purchaser, and was not executable in satisfaction of the judgment.⁷

Passing to the transfer of immovable property, it may be premised that under private international law no transfer of immovable property can be effected otherwise than according to the customs and laws of the place where such property is situate.⁸

In this Colony no person can be said to be the

⁵ *Rens v. Bam's Trustee*, 2 Menzies, 89.

⁶ *Long v. Randall*, 1 E. D. C. 62.

⁷ *Forth v. Grunewald*, 14 S. C. 269.

⁸ Voet, 41: 1: 39.

owner of land or immovable property until he has obtained transfer of the same. It is the transfer which gives the *dominium*. Without transfer a purchaser has only the right to claim the transfer; he is not the proprietor of the ground, though he may have paid the purchase price.⁹

Without the intervention of the Courts no transfer of land can be effected, unless there has been a previous grant of such land by the Government to the transferror, or to some other person through whom the transferror has acquired his title. The nature of these Government grants and of the land tenure of the Colony has varied from time to time, but the only two forms of tenure which survive at the present time are perpetual quitrent and freehold, with respect to both of which formal written grants or title-deeds are issued, accompanied by proper diagrams framed after actual survey, and registered in the office of the Registrar of Deeds.¹⁰ All lands, therefore, owned by private persons at the present day are registered in the office of the Registrar of Deeds, and no land is so registered which has not at some time or other been granted by the Crown (in whom the title to all ungranted land in this Colony is legally vested),^{10a} or which has not been ordered to be so registered by a judgment of one of the superior Courts of law. In addition to this, as will be shown further on, all subsequent transfers of land, and all servitudes, mortgages, and other real burdens upon land (with the exception

⁹ *Van der Spuy v. Maddison*, 7 Buch. 97. See also *In re Widow Laub-scher*, 1 Menzies, 374; *Lucas' Trustee v. Ismail & Amod*, (1905) T. S. 242.

¹⁰ Proc., Aug. 6, 1813, sec. 13. As to the interpretation of such grants see *Barrington and others v. Colonial*

Government, 4 S. C. 403; *Visser v. Du Toit*, 5 S. C. 94; *Hirsch v. Gill*, 10 S. C. 156.

^{10a} *Colonial Government v. Table Bay Harbour Board and Cape Town Town Council*, 2 Buch. App. C. 335, 339.

of legal mortgages), in order to be valid, require to be registered in the office of the Registrar of Deeds, and in this way a complete check is kept upon all deeds affecting the ownership of land.

Before 1828 all transfers of landed property, mortgage bonds, and other like acts and instruments used to be certified and enregistered before and subscribed by two members of the Court of Justice, in the presence of the Colonial Secretary, but in consequence of the abolition of the Court of Justice, a change was made in this respect by Ordinance No. 39 of 1828, which provided that in future all such deeds were to be certified and enregistered before and subscribed by the Registrar of Deeds, and a register of the same kept in the office of such Registrar, and that in future the registers were to be kept and all entries therein made by him.

Before the passing of Ordinance No. 14 of 1844, again all deeds of transfer of and special mortgage bonds on immovable property had to be prepared exclusively in the office of the Registrar of Deeds, but by that Ordinance it was provided that in future all such deeds might be prepared or drawn by an advocate of the Supreme Court or a duly authorized conveyancer.

Our law with respect to the registration and transfer of immovable property is derived, not from the Roman law, which drew no great distinction between the delivery of movable and the transfer of immovable property, but from the customs of the Netherlands. From a very early period it was a well-recognized custom in many parts of the Netherlands that no transfer of immovable property was considered valid as against creditors of the transferror, unless effected

before the Court and in accordance with the customs of the place (*coram legi loci*) where such property was situate,¹¹ and the transfer duty paid.¹² This custom had in the year 1529 become so general that the Emperor Charles V., by a Placaat or Edict promulgated on May 9 of that year,¹³ declared it to be of universal application throughout the province of Holland and West Friesland, from which the laws of this Colony are mainly derived. A subsequent edict of May 9, 1560,¹⁴ provided that a proper register of all transfers and alienations of landed property should be kept by the secretaries or clerks of all cities, towns, etc., and on December 22, 1598,¹⁵ an Ordinance was passed by the States of Holland and West Friesland imposing a transfer duty of 2½ per cent. (*de veertichste penningh*) on all transfers, alienations, and hypothecations of landed property, and commanding the secretaries of all towns to keep a correct register of the same, and not to allow any such transfers or mortgages to pass or be enregistered except upon production of a certificate from the Collector of the Revenue that the duty had been duly paid. The provisions of this last-mentioned Ordinance were continued, modified, and amended from time to time by later Ordinances, extending down to the date of the publication of Voet's Commentary on the Pandects in 1698.¹⁶

At the date, therefore, of the occupation of this Colony by the Dutch in 1652, the registration of immovable property had been largely carried out in the province of Holland and West Friesland, and it

¹¹ *Visser v. Du Toit*, 5 S. C. 96; Voet, 41 : 1 : 38, 42; G. 2 : 5 : 13; V. D. K., Th. 202; R. Obs., part 3, obs. 32; V. L., v.l. 1, p. 191.

¹² Voet, 41 : 1 : 38; 19 : 1 : 12.

¹³ 1 Groot Placaatboek, col. 373.

¹⁴ 2 Groot Placaatboek, col. 759, 1402.

¹⁵ 1 Groot Placaatboek, col. 1952.

¹⁶ Voet, 41 : 1 : 38-42.

had become a general rule and essential principle of the laws of that province that no ownership or *dominium* in or other *jus in re* to land could be transferred otherwise than by a transfer made *coram lege loci*. This rule and practice was, with the rest of the laws of Holland and West Friesland, introduced into this Colony on its first settlement.¹⁷

The registration of transfer required by our law is a judicial act, by virtue of which the full ownership passes from the transferror to the transferee, and that whether the title-deeds have been delivered to the latter or not.¹⁸ No servitude, encumbrance, or other restriction upon the full ownership can validly be imposed without registration in the Deeds Office and endorsement upon the registered title. So long as a clean transfer stands registered, the transferee enjoys the full rights of ownership, subject only to such exceptional rights as may have been acquired by a lessee or by prescription, and to such legal mortgages or tacit hypothecations as are recognized by the law.¹⁹

It is the register which must be looked to for the purpose of ascertaining who is the owner of any particular piece of ground, and, as between any non-registered claimant to land and third parties, such registration is regarded as conclusive,²⁰ with the exception of certain excepted cases which will be referred to later on.²¹ There may also be exceptional circum-

¹⁷ *Harris v. Trustee of Buissinne*, 2 Menzies, 105.

¹⁸ V. D. K., Th. 202.

¹⁹ *Clayton, N. O., v. Metropolitan and Suburban Railway C.*, 10 S. C. 302.

²⁰ *In re Widow Laubscher*, 1 Menzies, 374; *Anstruther and others v. Trustees of E. L. Chiappini and*

A. Chiappini & Co., 3 Searle, 91; *Klendgen & Co. v. Trustees of Rabie*, Foord, 63; *Beukes v. Uys*, 2 S. Af. Rep. 153; *Wilson & Hall v. Wessels*, 1 Cape Times, 107; *Houghton v. Registrar of Deeds*, (1905) T. S. 448.

²¹ See pp. 80-82, below, and Book I., p. 150.

stances which may take a case out of the general rule.²²

The institution of registration is intended for the protection of innocent third parties who have an interest in knowing in whom any particular land is vested, and in order, with this object in view, to prevent clandestine transfers of land, and give notice to all the world of any changes of ownership or diminution in the rights of ownership which may take place from time to time.²³ Registration will consequently not be required as against any particular third party who has had special notice of the passing of the ownership.²⁴ But it may be laid down as a general rule, that, as between an intended transferee and the creditors of the transferror, every transfer of land will be void which has not been duly registered in the office of the Registrar of Deeds, and that even though declarations of seller and purchaser may have been made, the title-deeds accompanied by a duly executed power of attorney to pass transfer handed over to the purchaser, and possession of the land given to him, and the purchase price and transfer duty duly paid.²⁵ The only right which a purchaser has under such circumstances is a *jus in personam* or *ad rem* against the seller himself, and his only remedy an action for specific performance, that is, to compel the seller to pass transfer in due form of law, both of which will be frustrated by the insolvency of the seller,²⁶ without the

²² *Kimberley Divisional Council v. London and South African Exploration Co.*, 2 Buch. App. C. 23.

²³ *Judd v. Fourie*, 2 E. D. C. 54; Voet, 19: 2: 1; 18: 6: 9; 41: 1: 42; Schorer, Note 76 *in fine*; V. L., vol. 1. p. 191.

²⁴ *Hansen & Schrader v. Colonial Government*, 20 S. C. 446.

²⁵ *Harris v. Trustee of Buissinne*,

2 Menzies, 105; *Venter v. Green and another*, 1 Roscoe, 43; *Kellar's Trustee v. Kotze*, 1 Menzies, 411; *Norden, Trustee of Smith v. Norden*, 2 Menzies, 134; *Lucas' Trustee v. Ismail & Amod*, (1905) T. S. 239.

²⁶ *Harris v. Trustee of Buissinne*, 2 Menzies, 105; *Hanekom's Trustee v. Kotze*, 1 Menzies, 411.

purchaser even being entitled to a preference on the insolvent estate for any part of the price which may have been paid by him.²⁷

As between the transferror himself or his heir or executors, on the one hand, and the transferee, on the other, there is nothing to prevent the transferror from divesting himself of all his rights of ownership without any solemn transfer having been effected.²⁸ In the same way the terms of an agreement to transfer will be binding as between the parties themselves, even though such terms may have been erroneously set forth in the deed of transfer, at any rate to this extent, that a rectification of the transfer will sometimes be granted as a matter of equity, provided that this can be done without prejudice to third parties.²⁹

No cancellation of a transfer, which has once been validly passed, can be effected except with leave of the Court, which will not be granted unless legal ground for the same be shown. In the absence of legal ground the only way in which the ownership can be restored to the original transferror is by way of a formal re-transfer to him.³⁰

As regards the general requisites of the transfer of ownership mentioned above,³¹ it may be stated that under our system of registration of land a transfer of immovable property by any other than the owner, except by means of forgery or fraud, which would

²⁷ *Harris v. Trustee of Buissinne*, 2 Menzies, 105.

²⁸ *Melck, Executors of Burger v. David and others*, 3 Menzies, 468; Voet, 18: 6: 6; 41: 1: 42; V. L., vol. 2, p. 138.

²⁹ *Saayman v. Le Grange*, 9 Buch. 10; *Salie and another v. Abrahams*, 17 S. C. 363. See also *East London Municipality v. Colonial Govern-*

ment, 17 S. C. 204; *Moravian Mission v. Mona and others*, 15 E. D. C. 13; *Ex parte Leygonie*, 19 S. C. 344; *Ex parte Berry*, 20 S. C. 186; *Ex parte Van Rooyen*, 20 S. C. 420; *Nyobo and others v. Ndaba and another*, 20 S. C. 617.

³⁰ *Colquhoun & Dow v. Transvaal Government*, (1903) T. S. 724.

³¹ Page 62, above.

make a transfer void, is impossible. The intention is here, as in the case of the delivery of movables, of the very essence of the transaction, but such intention is to be gathered from the deed of transfer itself, and not from any verbal or unregistered written agreement; and the non-payment of the purchase price will not affect the validity of the transfer, as might be the case with a delivery of movables under similar circumstances. No acceptance by the transferee is required for the validity of a transfer,³² nor a *justa causa* or consideration;³³ but, as regards the latter, a transfer made without consideration, or by way of undue preference, though not void, is voidable at the suit of the creditors of the transferrer, under sections 83 and 84 of the Insolvent Ordinance,³⁴ as would also be any other alienation made in fraud of creditors.³⁵

As stated above, the registration of land in the office of the Registrar of Deeds may have its origin either in a grant from the Crown or in a judicial decree. The latter may happen in a case in which a right to claim the ownership of land has been acquired by prescription against the Crown, or where the Government has by express or implied contract bound itself to issue a grant. In either case the Court would no doubt make an order on the Government to issue a grant in due form, and the Government would then issue such grant as would be applicable to the land in question.

In the case of lands, title to which has once been held by private persons, the registration of title may by judicial decree be obtained in the manner and upon

³² Voet, 41: 1: 38.

³³ Voet, 41: 1: 40.

³⁴ Ord. 6, 184°.

³⁵ Schorer, Note 73.

any of the grounds provided for by Act 28 of 1881. It may also be obtained by a judgment in a contested case of ownership, or in a suit for the specific performance of any contract for the transfer of ownership, such as a sale and such like.³⁶ In such a case the registration of the transfer is usually effected by an order upon the unsuccessful party to pass the transfer, but the Court may also carry out its own judgment by ordering the Sheriff or the Registrar of Deeds to give and effect transfer.³⁷

CHAPTER XI.

OTHER MODES OF ACQUIRING OWNERSHIP—PRESCRIPTION.

To the rule that all transfers of immovable property must be effected *coram lege loci* there were certain clear exceptions under the common law, as to which the text-writers are pretty well agreed; but whether these exceptions still obtain at the present day is in more than one instance doubtful. These exceptions occurred in the case of community of property by marriage, of inheritance or succession, of legacy or bequest, of the constitution of a *dos*, and of the adjudication of particular articles of property to particular heirs in the case of the distribution of the estate of a deceased person, in all of which cases the ownership was held to pass without the necessity of any transfer *coram lege loci*.¹

³⁶ V. L., vol. 1, p. 193.

³⁷ *Van der Byl v. Hanbury*, 2 S. C. 80; *In re Cradock Building Society*,

13 S. C. 99; G. 2 : 5 : 17, 18.

¹ Voet, 18 : 1 : 15; 41 : 1 : 41; V. L., C. F., part 1 : 2 : 7 : 5 *in fine*

As regards community of property, nothing has happened, either by way of statutory enactment or otherwise, to alter the common law providing for the reciprocal transfer *ipso jure* of the ownership of property between two spouses who have married without any antenuptial contract. Indeed, that law is expressly recognized by our statute law.² The subject of community of property, however, has already been fully discussed above, and need not be here repeated.³

As regards antenuptial contracts, which are added by Van der Keessel to the list of exceptions,⁴ it would appear that under the Placaat of Charles V., of October 4, 1540,⁵ a wife could not claim any property or benefit out of property settled upon her by her husband, even though such property or benefit may have been actually transferred or secured by pledge or special mortgage, until all the creditors of the husband had been paid in full; ⁶ and it is therefore difficult to see how the question could have arisen in connection with an antenuptial contract, except in so far as the community may have been retained. At the present day a transfer under a marriage settlement is valid against all future creditors of the husband, but may, under certain circumstances, be set aside in favour of creditors of the husband whose debts or demands existed at the date of the registration of the antenuptial contract.⁷ Without transfer, however, it is submitted that no ownership in land can pass in such

Groen., De Leg., Inst. 3: 23: 1; Schorer, Note 75. See also Grotius, 2: 1: 7, and Groenewegen's footnote 4 to the same.

² See the Transfer Duty Act, No. 5, 1884, sec. 19, sub-secs. 7 *et seqq.*, which recognizes that no transfer

duty is payable as between spouses.

³ See Book I., p. 34 *et seqq.*

⁴ V. D. K., Th. 202.

⁵ Placaat, Oct. 4, 1540, sec. 6.

⁶ See Book I., p. 66.

⁷ See Book I., p. 68.

a case, seeing that antenuptial contracts are, like general bonds, executed before a notary, and a transfer of land can only be executed before the Registrar of Deeds.

Inheritance and bequest, though they have also been instanced by the text-writers as modes of acquiring ownership,⁸ can, as has been already pointed out,⁹ no longer be regarded as such, the ownership in the subject-matter of an inheritance, as well as of a bequest, vesting in the executor of the deceased's estate, the heir and legatee respectively having merely a real action against the executor, in the one case, for the balance of the estate after payment of the debts and legacies, and, in the other, for delivery or transfer of the property bequeathed. The alienation of such property by the executor in either case, however, is not necessarily void, though voidable. Both the heir and the legatee, however, will have a real action (*rei vindicatio*) for the recovery of the property from any possessor who has not acquired title through the executor.¹⁰

But the most important mode of acquiring ownership otherwise than by transfer is prescription, whereby property is acquired by a person through the mere fact that it has been occupied and continuously possessed by him as his own for a certain period of time fixed by law, without its having been claimed by any one else.¹¹ It is based upon the principle, which is not without reason in equity, that penalties should be imposed on those who, through their negligence and carelessness about their own affairs

⁸ Voet, 30: 39; G. 2: 8: 6; V. xxvii. Note 24.
D. L. 145.

⁹ See Book I., p. 150, and Chapter

¹⁰ *Ibid.*

¹¹ Voet, 44: 3: 1.

and property, do an injury to the State by introducing an uncertainty as to ownership and an endless multiplicity of lawsuits, together with the trouble, annoyance and confusion which are the necessary consequence, it being considered that in the case of property no more equitable and appropriate penalty for such negligence can be imposed than the loss of that very property which the owner has dealt with so negligently as almost to leave the impression that his intention was to abandon it.¹² In other words, he is presumed, as a punishment for his neglect, to have made an implied grant in favour of the person whom he has allowed to continue in possession of the property for such a length of time as the law considers sufficient to establish the presumption.

The Roman law recognized two modes of acquiring ownership by means of long-continued possession, namely, *usucapion* and prescription in our modern acceptance of the word.

The *usucapion* of the Roman law, whether of three, ten or twenty years, is no longer known amongst us.¹³ Some short periods of prescription are still recognized by our law, but these have reference not to the acquisition of ownership, but to the limitation of actions. The only prescription recognized amongst us as a mode of acquiring property is the prescription *longissimi temporis* of the Roman law, the period for the completion of which has now been fixed by statute at thirty years for immovable property,¹⁴ and the same period is by the common law fixed as regards movable property,

¹² *Smith and others v. Martin's Executors*, 16 S. C. 151; Voet, 41 : 3 : 1; G. 2 : 7 : 4; Schorer, Note 82.

¹³ Voet, 44 : 3 : 7; Groen., De

Leg., Inst. 2 : 6 : pr.; V. L., vol. 1, p. 200; V. D. D. 121.

¹⁴ Act 7, 1865, sec. 106.

whenever there is no express statutory provision to the contrary.¹⁵

Where the period of prescription differs at the domicile of the plaintiff and the defendant respectively, that period must be observed which obtains by the law of the domicile of the defendant, unless the prescription of immovable property is in question, in which case neither the law of the domicile of the person prescribing nor that of the person to whose prejudice the prescription is running, but rather the law of the place where the property is situate, is to be observed.¹⁶

Prescription applies to both movable and immovable property,¹⁷ and of immovable property it applies to both freehold and quitrent. Where, for instance, a possessor has occupied land for the period of prescription in the belief that it formed part of another portion of land held by him on perpetual quitrent tenure, the Government will be justified in granting him, and may be compelled to grant him, a quitrent title to such land.¹⁸

For the purpose of computing this period of prescription, the possession of a deceased person and his executor or heir and of a person and his particular successor, whether legatee or purchaser, will be reckoned together;¹⁹ but it is essential that the full period of thirty years shall have completely expired.²⁰

For the purposes of this prescription neither *justus titulus* nor *bonâ fides* is required, as was the case with respect to *usucapion* under the Roman law,²¹ it being sufficient that a person has possessed property with the

¹⁵ V. L., vol. 1, p. 201 *et seqq.*; V. L., C. F., part 1: 2: 10: 11.

¹⁶ Voet, 44: 3: 12; Schorer, Note 80.

¹⁷ Voet, 44: 3: 8; Schorer, Note 80.

¹⁸ *Blanckenberg v. Colonial Government*, 11 S. C. 90.

¹⁹ Voet, 44: 3: 9.

²⁰ Voet, 44: 3: 1.

²¹ Voet, 44: 3: 3-9.

intention of holding it as his own in a peaceable and open manner and as of right (*nec vi, nec clam,*²² *nec precario*), without any disturbance on the part of the real owner and without recognizing or acknowledging him in any way as such.²³ It follows from this that stolen property and property taken possession of by force and violence cannot be acquired by prescription; ²⁴ and also that, as the right to acquire ownership by prescription is founded upon the negligence of the owner in not protecting his own interests against strangers who have taken possession of his property, it is essential, in order to establish such negligence on his part, that the adverse possession by the stranger should be patent and evident both to him and others. It is not necessary, indeed, to prove that the whole of the land claimed by prescription has been cultivated or fenced in, but there should be proof that the adverse possession was so patent that the owner, with the exercise of reasonable care, was bound to have observed it.²⁵

The possession must also be continuous and uninterrupted for the full period of the time required by law for the completion of prescription, and it will lose all its force and effect if broken into by what is regarded in law as an interruption, or, as the Romans called it, a "*usurpatio*." Such interruption takes place either naturally or civilly,²⁶ or, in other words, either extra-judicially or judicially.²⁷

It takes place naturally or extra-judicially by the

²² As to when a thing is said to be done *vi* or *clam* see Voet, 43: 24: 1; Schorer, Note 515.

²³ *Jones v. Town Council of Cape Town*, 12 S. C. 26, and 13 S. C. 50; Voet, 44: 3: 9; Schorer, Note 80; V. D. K., Th. 207.

²⁴ Voet, 41: 3: 14.

²⁵ *Smith and others v. Martin's Executor Dative*, 16 S. C. 151.

²⁶ Voet, 41: 3: 7.

²⁷ *Pienaar v. De Klerck*, 16 S. C. 370.

dispossession of the occupier or possessor, and by dispossession is meant not necessarily forcible personal dispossession,²⁸ but any act amounting to an adverse occupation and inconsistent with continued possession by the person in whose favour prescription is running. Consequently dispossession has been decided to have taken place where the owner of a farm removed a beacon encroaching on his land, erected a new beacon on the line claimed by him, and compelled one of the proprietors of the adjoining farm, who had pulled down such new beacon, to re-erect it on pain of being criminally prosecuted.²⁹

Prescription could under the earlier Roman law be interrupted only by the *litis contestatio*, or what would with us be the closing of the pleadings or joinder of issue in an action instituted for the purpose of disputing the right,³⁰ though under the law of Justinian such interruption could, where the absence of the occupier rendered the interposition of the *litis contestatio* impossible, be effected by way of a complaint or protest made in due form of law;³¹ but by the latest Roman law a summons was regarded as sufficient,³² and so it has been held with us.³³

Prescription will run not only against private individuals, but also against public corporations, such as Municipal or Divisional Councils, at any rate as regards property owned by these latter, and which is capable of being alienated by them. Hence it has been held that prescription runs against a Town Council in respect of land forming part of a public

²⁸ Voet, 41 : 3 : 18.

²⁹ *De Klerck v. Pienaar*, 16 S. C. 370.

³⁰ Voet, 41 : 3 : 19.

³¹ *Ibid.*

³² Voet, 41 : 3 : 20.

³³ *De Klerck v. Pienaar*, 16 S. C. 370 ; *Van Schalkwyk v. Hugo and another*, Foord, 89.

square, even where such land was not alienable except with the consent of the Governor, prescription not being barred in the case of land which can only be alienated with the consent of a third party;³⁴ but, as the Government was not a party to the action in the case referred to, the Court refused to make an order that the plaintiff was entitled to transfer of the land in question, but merely declared that, as against the defendant Council, the plaintiff was entitled to exercise full rights of ownership in respect of the land, subject to all municipal regulations.³⁵

Prescription will run even against the public at large so as to deprive it of portions of the land forming a public road, for though the public cannot by mere non-user lose its right to a public road,³⁶ it does not follow that the right may not be lost by adverse user. The rule that the right to a public road cannot be lost by non-user is based upon the principle that prescription does not obtain as against matters which are merely optional (*meræ facultatis*),³⁷ at any rate in so far as they are merely optional, and the right of a public to the use of a public road can only be said to be optional as long as no act or fact intervenes to prevent the use of the road. For, if a person has for the period of prescription used a public road as his own private property by building, sowing, or planting upon it, or by placing a hedge or some other obstruction across it so as to prevent the public from using it, without the public interfering and asserting its right by action, there is no doubt that the public right of way will be lost.³⁸

Prescription will run even against the Crown, at

³⁴ *Jones v. Town Council of Cape Town*, 12 S. C. 19.

³⁵ *Ibid.*, p. 43.

³⁶ D. 43 : 11 : 2.

³⁷ Voet, 44 : 3 : 11.

³⁸ Voet, 13 : 7 : 7.

any rate as regards property, whether corporeal or incorporeal, which is capable of being owned or possessed by private persons as well as by the State,³⁹ and which is capable of being alienated by the Government to private persons,⁴⁰ even though the Legislature may have laid down certain conditions upon which such alienation shall take place;⁴¹ but not as regards property which cannot be so alienated, such as public buildings, fortifications, etc.⁴²

Prescription will not, however, run against persons who are unable to sue either because the law or the will of a testator prevents an action from being instituted.⁴³ Consequently it does not run against minors⁴⁴ or lunatics, or other persons who are under curatorship or persons who are absent from the country on account of war or for some other public reason.⁴⁵ Nor can a married woman be prejudiced by the fact that her husband has *stante matrimonio* alienated her separate property contrary to the provisions of the antenuptial contract, and that the property has thereafter during the subsistence of the marriage been in possession of a third person for the period of prescription, because, being under the power of her husband, she cannot during the marriage appear in Court to recover her property so wrongfully alienated.⁴⁶ In the same way it will not prejudice a particular or universal

³⁹ Voet, 44: 3: 11; 41: 3: 12.

⁴⁰ *Lentsky v. Surveyor-General*, 7 Bich. 68; *Municipality of Frenchhoek v. Hugo*, 2 S. C. 248; Voet, 44: 3: 11; *Blake v. Goldman and others*, (1903) T. S. 764.

⁴¹ *Blanckenberg v. Colonial Government*, 11 S. C. 90.

⁴² *Ibid.*

⁴³ *De Jager v. Scheepers*, Foord, 124; Voet. 44: 3: 11.

⁴⁴ Voet, 41: 3: 13; 4: 4: 29 and 30; 4: 6: 15. With regard to certain shorter periods of prescription having reference to matters of procedure, and which do run against minors, relief may be obtained by way of *restitutio in integrum* (Voet, 4: 4: 29 *in fine*).

⁴⁵ Voet, 44: 3: 9.—Conf. Voet, 4: 4: 12.

⁴⁶ Voet, 44: 3: 11.

fideicommissary, if the property subject to the fideicommissum is alienated pending the fulfilment of the condition of the fideicommissum, and thereafter, before the fulfilment of the condition, the period of time required for prescription has elapsed,⁴⁷ because prescription does not begin to run in such a case until the right of action of the fideicommissary has come into existence, that is, not until the fulfilment of the condition upon which the property is to be handed over to him.⁴⁸

When once prescription has been completed by the lapse of the legal time, it will not only afford a good defence to an action of ejectment or other action based on ownership, but will also give the person entitled to it a right to sue for a registered title or transfer under the common law,⁴⁹ or to apply by way of petition to the Supreme Court, E. D. Court, or High Court of Griqualand West for the registration of his title, in terms of Act 28 of 1881. Where a person who is entitled to a prescriptive claim to land, but has not obtained registration for the same, stands without protesting whilst such land is being sold by judicial sale in execution, he cannot afterwards claim the land as against a *bonâ fide* purchaser with notice; and it would appear that this would be the case even where the sale is not a judicial one, provided that the person claiming the prescriptive title has had notice of the same.⁵⁰

⁴⁷ Voet, 44: 3: 11.

⁴⁸ *De Jager v. Scheepers and others*,
Foord, 120.

⁴⁹ *Jones v. Town Council of Cape*

Town, 13 S. C. 51; *Blanckenberg v. Colonial Government*, 11 S. C. 90.

⁵⁰ *South African Association v. Van Staden*, 9 S. C. 95.

CHAPTER XII.

THE RIGHTS OF OWNERSHIP.

AS was pointed out above, the ownership of a thing consists in the exclusive rights of possession, of enjoyment, and of disposition. Of the right of alienation we have already treated. With the right of possession we dealt at some length above, and it is sufficient to add here that, as one of the ingredients of ownership, it is exclusive in its nature, and, in the absence of any agreement or other legal restriction to the contrary, it will entitle the owner to claim the possession from any one who cannot set up a better title to the same, and to warn him off the property, and eject him in the case of land.¹

The form of action for the recovery of ownership was under the Roman law called *vindicatio rei*, which was an action *in rem*, that is, aimed at the recovery of the thing itself which is in the possession of another,² whether such possession was rightfully or wrongfully acquired,³ together with all its accretions and fruits, and compensation in damages for any loss sustained by the owner through having been deprived of it.⁴ The action should, as a rule, be brought against the person who is in possession of the property claimed; but this rule is subject to certain exceptions. One of these is where a possessor, whether *bonâ fide* or *malâ fide*, parts with the property with knowledge and in fraud of

¹ *Donovan v. Du Plooy*, 2 S. Af. Rep. 134; *Wilson & Hall v. Wessels*, 1 Cape Times, 107.

² Voet, 6 : 1 : 2; G. 2 : 3 : 3 *et seqq.*

³ *Vorster v. Hodgson*, 19 S. C. 493.

⁴ *Hadley v. Leonard*, 20 S. C. 78; Voet, 6 : 1 : 30; V. D. L. 121.

the owner's rights.⁵ The fact that the property in question was in the possession of the defendant at the time when the cause of action accrued is of the very essence of the action, and it is therefore necessary for the plaintiff to allege such possession in his declaration, and to establish it by evidence, or otherwise to prove that the defendant has fraudulently parted with the possession.⁶

The restoration of the possession will not be granted upon motion, except in a case of spoliation, as shown above,⁷ but can only be recovered by way of action, unless, indeed, the property is in the possession of an officer of the Court, from whom it is being claimed.⁸ The restoration will have to be made in the place where the property is or where it is sued for, either immediately or within a reasonable time at the discretion of the Court,⁹ and where the defendant is unable to restore the property itself, he will be liable to make compensation in damages.¹⁰

It remains to consider the rights of user and enjoyment to which an owner of a thing is entitled, and also the right of disposition in so far as it consists in anything else than alienation. With respect to these it may be said generally that a man may, in the absence of any express law or servitude to the contrary, use and enjoy the property belonging to him in any way he pleases, may alter the character thereof, and may even destroy it absolutely, subject only to the maxim "*sic utere tuo ut alienum non lædas*," that is to say, provided such use, enjoyment, alteration, or

⁵ *Sadie v. Standard Bank*, 7 S. C. 92; *Smith and another v. Sharenovitz*, 20 S. C. 591; Voet, 6 : 1 : 22, 32.

⁶ *Philip Brothers v. Wetzlar*, 8 Buch. 77.

⁷ See p. 26 *et seqq.*, above.

⁸ *Goldstein v. Fry, N. O.*, 1 H. C. 114.

⁹ Voet, 6 : 1 : 30.

¹⁰ Voet, 6 : 1 : 32-35.

destruction be not prejudicial or injurious to the legal rights of others. Subject to this proviso, he may use or misuse his property in any way he thinks fit, even though actual damage may thereby result to others, provided he does not interfere with their legal rights. These principles apply to both movable and immovable property, but it is more especially in connection with ownership in land that they become of importance.

All ownership in land, as already shown, when traced to its origin, is with us based upon an actual or implied grant from the Crown, which was originally the owner of all the land in the country.^{10a} Now, it is a principle of our law with regard to servitudes that, whenever a servitude is granted, everything is presumed to have been granted with it, without which the proper exercise and use of such servitude by the grantee would be impossible.¹¹ The same principle is extended to the grant of full ownership in land, from which servitudes are mere deductions, and it may be laid down that, whoever makes a grant of land must be presumed to have granted everything without which the continued existence and the proper use and enjoyment of such land would be impossible. For the purposes of such continued existence and use and enjoyment, it is essential that all owners of land, besides exercising the rights of ownership upon their own land, shall in addition have certain rights as against adjoining land, and also certain rights of control upon the exercise of his rights of ownership by the owner of latter. In other words, all land is by the very nature of things subject to certain obligations as

^{10a} *Cape Town Town Council v. Colonial Government and others*, 23 S. C. 69.

¹¹ *Retief v. Louw*, 4 Buch. 192; *Steyn v. Zeeman*, 20 S. C. 224; Voet, 8: 2: 18; 8: 4: 16.

regards adjoining lands, and these obligations are sometimes spoken of by jurists as natural servitudes or servitudes of necessity. Some of these so-called servitudes are of a negative and others of a positive character. The latter, which entitles a man to exercise certain rights of ownership on a neighbour's land, such as a right of way of necessity or necessary way, partake more of the nature of servitudes proper, and will be treated of under that heading. The former, of which the prohibition of nuisances, the obligation to lateral support, and the legal restrictions upon the use of running water are the most important, being mere limitations upon ownership in the common interest of all, will be treated of here.

A landowner's rights consist in the first place in the exclusive possession of his ground, and he will therefore be entitled to interdict others from trespassing upon the same, either personally or by their stock, and to recover compensation in damages for such trespass,¹² unless such rights have been restricted by registered servitude.¹³ The measure of such damage will, in the absence of aggravating circumstances, be the actual injury sustained by the plaintiff by reason of such trespass; but in assessing the damages the Court will be entitled to consider all the circumstances attending the trespass, and may give damages for collateral acts which aggravate the trespass. Consequently, where a defendant, knowing that the young of certain wild ostriches had been hatched out on the plaintiff's ground, and that the latter would in the usual course capture them for domestication, forestalled

¹² *Breda and others v. Muller and others*, 1 Menzies, 425; *London and South African Exploration Co. v. Howe & Co.*, 4 H. C. 214; *Van der*

Westhuysen v. Smith and others, (1905) T. S. 108.

¹³ *Hattingh v. Robertson*, 21 S. C. 273.

him by driving the young birds off his ground and capturing them and converting them to his own use, it was held that the Court was entitled to add the value of the birds to the amount of the other damages.¹⁴

It will be no defence to an action of trespass by defendant's cattle on plaintiff's cultivated lands that the cattle had come upon plaintiff's land by reason of the latter not having kept in repair a dividing fence, unless the plaintiff was under some legal obligation to effect the repairs.¹⁵

The rights of a landowner within the limits of his own ground, though in general unlimited, are subject to the enjoyment of similar rights by neighbouring proprietors,¹⁶ and to certain rights belonging to the public at large.¹⁷ Thus where there are two conterminous properties, the owner of each may do upon his own land whatever he thinks will contribute to its improvement or to his own pleasure or advantage, even though what he does should occasion damage to his neighbour, if without it he cannot have the full enjoyment of his rights of ownership;¹⁸ but he is not entitled to do anything which may interfere with the exercise of similar rights of ownership by his neighbour. He may, consequently, not carry on any dangerous occupation upon his own ground, unless he does so with such care and diligence as to ensure his neighbours and the general public as far as possible against any danger arising therefrom;¹⁹ nor will he

¹⁴ *De Villiers v. Van Zyl and others*, Foord, 77.

¹⁵ *Adams v. De Klerk*, 16 S. C. 456.

¹⁶ *Kohne v. Harris*, 16 S. C. 145.

¹⁷ *Green & Sea Point Municipality v. Egnal & Co.*, 19 S. C. 376.

¹⁸ *De Pass & Co. v. Rawson*, 1

Roscoe, 108, and 5 Searle, 1; *Reed v. De Beer's Consolidated Mines*, 9 S. C. 344.

¹⁹ *Fleming v. Rietfontein Deep Gold Mining Co.*, (1905) T. S. 117; *Clair v. Port Elizabeth Harbour Board*, 5 E. D. C. 311; *Elmer v. Warren*, 5

be entitled to create any nuisance upon his own ground whereby a neighbour's reasonable enjoyment of his rights of ownership,²⁰ or the general health and comfort of the public at large in the exercise of its public rights, are interfered with.²¹

In deciding as to what may be an actionable nuisance, our Courts, though not bound to follow the English decisions on the subject, will do so whenever these are not inconsistent with our law,²² and with this reservation those decisions have always been regarded as authorities of the greatest value and utility.²³

A most important distinction to be drawn in cases based upon nuisance is that between acts which are noxious to health or cause material injury to property, on the one hand, and those which are merely detrimental to personal comfort.²⁴ In the former class of cases, where it is clear that a matter complained of would be dangerous to the public health, if it be not abated or put a stop to, the Court will grant an interdict summarily restraining the nuisance.²⁵

As regards the amount of personal inconvenience which would amount to a nuisance and justify the Court in interfering by way of interdict, the following test was applied in the English case of *Walter v. Self*:²⁶ "Ought this inconvenience to be considered in fact as more than fanciful or as one of mere delicacy or

E. D. C. 385; *Apollis v. Joram*, 12 E. D. C. 187.

²⁰ *London and South African Exploration Co. v. Rouliot*, 8 S. C. 90; Voet, 19 : 2 : 20.

²¹ *Dell v. Town Council of Cape Town*, 9 Buch. 2; Voet, 43 : 8 : 1, 2; *Colonial Government v. Scaright & Co.*, 22 S. C. 360.

²² *Du Toit v. De Bot & Zuidmeer*, 2 S. C. 215.

²³ *Watson v. Geard*, 3 E. D. C. 427.

²⁴ *Du Toit v. De Bot & Zuidmeer*, 2 S. C. 216; *Gifford v. Hare*, 14 S. C. 259.

²⁵ *Beaufort West Municipality v. McIntyre*, 16 S. C. 541.

²⁶ *Walter v. Self*, 20 L. J., Ch. 433. See also *Blacketer v. Carter*, 19 E. D. C. 233.

fastidiousness, or as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, and not merely according to delicate or dainty modes and habits of living, but according to plain, sober, and simple notions among English people?" . . . "Did the defendant's act abridge and diminish seriously and materially the ordinary comfort and existence of the occupiers and inmates of the plaintiff's house?" The real question in all cases of nuisance is one of fact, namely, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence,²⁷ and, where this is established, it makes very little difference what the nature of the annoyance is, whether to the sense of smell or of hearing, or to any other sense.²⁸ In the case of *Crump v. Lambert*,²⁹ Lord Romilly, M.R., stated: "I consider it established by numerous decisions that smoke unaccompanied with noise or noxious vapour, that noise alone, that offensive vapours alone, although not injurious to health, may severally constitute a nuisance to the owner of the adjoining or neighbouring property; that, if they do so, substantial damages may be recovered at law, and that this Court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law." In the same way also it has been decided that the percolation of water, the penetration of damp through a wall, and the percolation of sewage, are actionable nuisances.³⁰

In deciding whether an act complained of is or is

²⁷ *Redelinghuys and others v. Silberbauer*, 4 Buch. 95.

²⁹ *Crump v. Lambert*, L. R., 3 Eq. 409.

²⁸ *Holland v. Scott*, 2 E. D. C. 313; Voet, 8: 2: 14; D. 8: 5: 8: 5, 6; 47: 10: 44.

³⁰ Per Shippard, J., in *Watson v. Geard*, 3 E. D. C. 427.

not an actionable nuisance, the locality in which it is being committed is often a very important matter for consideration, for what may be a nuisance in one place need not necessarily be a nuisance in another.³¹ If, for instance, as was stated in an English case,³² "a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable manner, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when the occupation is carried on by only one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury, then unquestionably there arises a very different consideration." In the same case Lord Cranworth said in his judgment: "I remember, when I had the honour of being one of the Barons of the Court of Exchequer, trying a case in the county of Durham where there was an action for smoke in the town of Shields. It was proved incontestably that smoke did come in, and in some degree interfered with a certain person. But I said, 'You must look at it now with a view to the question, not whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields.'"

³¹ *Du Toit v. De Bot & Zuidmeer*,
2 S. C. 213; *Holland v. Scott*, 2
E. D. C. 314.

³² *The St. Helen's Smelting Co. v. Tipping*, 35 L. J., Q. B. 66.

Thus, where an applicant for an interdict against certain cooperages carried on near his dwelling had gone to reside in a part of the village of the Paarl, where there was at the time, at all events, one cooperage in existence in the vicinity of which there were other manufactories carried on, such as a blacksmith's and wagon-maker's business, he himself also carrying on the business of a harness-maker and cart-trimmer, and the Paarl being a wine district where cooperages might naturally be expected to be carried on, the Supreme Court, applying the principles above laid down, refused the application.³³ Considerable regard in such a case is had to the fact that the applicant, when he went to reside at the place where he complained that the nuisance existed, knew that certain processes, such as brickmaking, for instance, were being carried on there, which might cause some inconvenience.³⁴ On the other hand, where in a part of Grahamstown not devoted to any particular trade, but occupied by private residences and places of business and shops, the defendant erected a galvanized iron workshop against the party-wall of plaintiff's dwelling-house, and close under his wife's bedroom, and the defendant carried on therein during the day from about sunrise to about sunset the business of a manufacturing tinsmith, thereby causing a noise interfering with the ordinary and comfortable enjoyment by plaintiff of his dwelling-house, the Eastern Districts Court granted a perpetual interdict restraining the defendant from carrying on his business in such a way as to occasion a nuisance to the plaintiff.³⁵

³³ *Du Toit v. De Bot & Zuidmeer*,
2 S. C. 213.

³⁴ *Gifford v. Hare*, 14 S. C. 261,
per Solomon, J.

³⁵ *Holland v. Scott*, 2 E. D. C.
307. See also Voet, 19:2:20, who
dismisses the subject in a very
casual manner.

Again, where in a street in King-Williamstown, which is mainly occupied by private residences, but contains a blacksmith's shop and a hotel, defendants erected a skittle-alley in connection with the hotel, and the game of skittles was played there at night with considerable noise, caused by the sound of the balls against the wooden floors and sides, and the cries of the players and markers, it was held by the Eastern Districts Court that this constituted a nuisance, and that the defendants were liable in damages, but an interdict was refused, as it was possible for the game to be played in such a manner as not to amount to a nuisance.³⁶

Where the abatement of a nuisance is a matter of urgency, the Court will grant an interdict even upon motion, there being no rule to the effect that the Court can only grant such an interdict upon action.³⁷

In the case of a public nuisance any member of the public may take steps to have it abated,³⁸ and where a nuisance causes injuries noxious to life and property, prescription will be no defence.³⁹

A landlord will not, as a rule, be liable at suit of a third party for a nuisance committed by a tenant on property leased by him. He will only be held liable for the acts of his tenant, where these acts have been committed under his express or implied authority.⁴⁰

The rights of ownership are not confined to the mere surface of the ground, but extend vertically to an

³⁶ *Bock v. Schroeder & Lond*, 9 E. D. C. 106. See also *Blacker v. Carter*, 19 E. D. C. 233.

³⁷ *Beaufort West Municipality v. McIntyre*, 16 S. C. 541; *Colonial Secretary v. Town Council of Grahamstown*, 6 E. D. C. 103; *Trill and others v. Claremont Municipality*, 21 S. C. 362.

³⁸ *Dell v. Town Council of Cape Town*, 9 Buch. 2; Voet, 43: 8: 1, 2.

³⁹ *Gifford v. Hare*, 14 S. C. 259.

⁴⁰ *Harris v. De Waal*, 12 S. C. 409; *Bock v. Schroeder*, 9 E. D. C. 106; *Baum v. Rode*, (1905) T. S. 66. Conf. *Colonial Government v. Mowbray Municipality and others*, 18 S. C. 453.

indefinite height above and to an indefinite depth below the surface, provided they are exercised in such a way as not to injure or interfere with the rights of ownership of the owners of neighbouring land. Thus a landowner may lawfully build or grow trees upon his own ground, even though a neighbour's lights or view may be obstructed thereby,⁴¹ unless there be some servitude *ne luminibus* or *ne prospectui officiat*. This right to build exists without any limit as to height,⁴² unless some limit has been imposed by statute or by some servitude *altius non tollendi*, restricting the right of building higher either generally in the public interest or in favour of some particular neighbouring property.⁴³ But if a person builds so high on his own ground that his building becomes a source of danger to his neighbour, the latter may give him notice of the danger, and, if damage does afterwards ensue, will be entitled to compensation in damages.⁴⁴

Care should, however, be taken not to build, nor to allow any part of one's building to project, beyond the vertical limits of one's own ground, such not being allowed in the absence of any servitude to that effect.⁴⁵ Where an encroachment has actually been made by means of a building standing partly on one property and partly on another, the owner of the property encroached upon may sue for the removal of the same⁴⁶ or otherwise, that the party causing the encroachment shall take transfer of the piece of ground actually covered by the encroachment, and of so much

⁴¹ G. 2 : 34 : 21 ; V. L., vol. 1, p. 151.

⁴² *Retief v. Louw*, 4 Buch. 188 ; G. 2 : 1 : 19, 21 ; V. L., vol. 1, p. 151 ; Groen., De Leg., C. 8 : 10 : 12.

⁴³ Schorer, Note 58.

⁴⁴ Groen., De Leg., D. 39 : 2 ; Schorer, Note 58.

⁴⁵ G. 2 : 34 : 3, 4, 7, 8 ; V. L., vol. 1, p. 289.

⁴⁶ *Pike v. Hamilton, Ross & Co.*, 2 Searle, 191.

of the rest of his ground as is rendered useless to him thereby, and to pay him the value of the ground so transferred, together with a reasonable sum as damages for the trespass and as a *solatium* for the compulsory expropriation of his property.⁴⁷ Where, however, there has been undue delay in applying for the former remedy, the Court will restrict the party injured to the latter.⁴⁸

The Roman law went further, and provided that a man should not build up to the extreme limit of his ground, but should allow a margin for the lateral support, apparently, of the neighbour's ground. Amongst other things, it was provided in the Digest,⁴⁹ as follows: "If a person fixes and erects a fence along another's land, let him not exceed his boundary; if a wall, let him leave a foot; but, if a house, two feet; if he digs a sepulchre or ditch, let him leave as much space as the sepulchre or trench is deep; if a well, a width of one pace; but an olive or fig tree, indeed, must be planted nine feet, other trees five feet, from the boundary." These rules, however, were not adopted by the Roman-Dutch law, the question having been left to be settled by local statutes or customs.⁵⁰

As regards trees planted near the boundary of a neighbour's land, it has been laid down that under the later customary law of Holland the neighbour could lop branches overhanging his land, even without previous notice to the owner of the tree, but cannot keep the branches so lopped off for himself, unless the owner of the tree refuses to take them himself; nor

⁴⁷ *Christie v. Haarhoff and others*,
4 H. C. 349.

⁴⁸ *Myburgh v. Jamison*, 4 Searle, 8.

⁴⁹ D. 10: 1: 13.

⁵⁰ Groen., De Leg., C. 8: 10: 9-11; Voet, 10: 1: 12 *in fine*. See also *Green and Sea Point Municipality v. Kramer*, 19 S. C. 337.

can he cut down branches not overhanging his ground.⁵¹ If he does not cut down the overhanging branches, he will be entitled to the fruit thereon.⁵²

Trees standing on the common boundary line of two properties are common property, and cannot be cut down without the consent of the owners of both.⁵³

The rights of ownership extend also vertically downwards into the bowels of the earth, and, in the absence of legislation to the contrary, carry with them the ownership of whatever is found there in the way of minerals or metals;⁵⁴ and in the search for these, as well as for any other purpose for his own benefit, a landowner may lawfully dig upon his own ground to any depth he pleases. This right, however, is subject to the condition that he does no injury to the rights of his neighbour or of the public at large by digging so near to the neighbour's ground or to any road or other public place as to endanger its stability,⁵⁵ or by making excavations on his own land in such localities or with such negligence as to be a source of danger to the life, limb, or property of persons lawfully using any road or being on such land.⁵⁶

Every owner of land is entitled to demand that the natural surroundings of his ground shall be left undisturbed in so far as their continued existence is essential to the stability of his own ground and to the proper and reasonable enjoyment by him of his

⁵¹ *De Villiers v. O'Sullivan and another*, 2 S. C. 251; Voet, 8 : 2 : 4; 43 : 27; G. 2 : 34 : 21; V. L., vol. 2, p. 299, secs. 19, 20; Groen., De Leg., D. 43 : 27.

⁵² G. 2 : 34 : 21; Voet, 43 : 28.

⁵³ *Fleming v. The Liesbeck Municipality*, 3 S. C. 268.

⁵⁴ *Webb v. Giddy*, L. R., 3 App. C. 908.

⁵⁵ *London and South African Exploration Co. v. Rouliot*, 8 S. C. 91; Voet, 39 : 1 : 1; D. 39 : 2 : 24 : 12 *in fine*.

⁵⁶ *Wright v. Paterson*, 5 Searle, 29, and 5 E. D. C. 390; *Marais v. Eloff*, Hertzog, p. 138; *Fleming v. Rietfontein Gold Mining Co.*, (1905) T. S. 111; *Clingen v. Ross*, 16 S. C. 152.

rights of ownership therein, and amongst these surroundings the lateral support which ground derives from all circumjacent ground is one of the most important. A man may, therefore, dig upon his own ground to any depth he pleases, provided he does not remove the natural lateral support to which his neighbour's ground is entitled, or, if he does so, that he replaces it by some other equally efficient artificial support.⁵⁷ But if a man makes an excavation on his own land so near to a road or other place of public resort as to be a source of danger to the people who are lawfully using the road or frequenting such public place, such excavation would amount to a public nuisance, and the owner of the land would be liable to an interdict, and would, further, be responsible for any damage which ensues to any member of the public who accidentally strays off the road or other public place whilst using it in the ordinary way.⁵⁸

Whether this right to lateral support is restricted to the land in a state of nature merely, or whether it is extended also to land which has been built upon, has not been decided by the Court of this Colony; but it was decided by the High Court of the South African Republic in one case that the right to lateral support attaches also to buildings erected by a man close to the boundary of his ground,⁵⁹ the decision being based mainly upon Voet 39 : 1 : 1 and D. 39 : 2 : 14 : 12.

The right to lateral support may, of course, be waived or abandoned, like any other right, but such waiver or abandonment will not be presumed unless it

⁵⁷ *London and South African Exploration Co. v. Rouliot*, 8 S. C. 74.

⁵⁸ *Clingen v. Ross*, 16 S. C. 152; *Wright v. Paterson*, 5 E. D. C. 390,

and 5 Searle, 29.

⁵⁹ *Johannesburg Board of Executors and Trust Co. v. Victoria Building Co.*, 1 Off. Rep. 43.

has been expressly stipulated for, or unless it follows as a necessary result from the circumstances of the case. Thus it will not be presumed, where an owner lets a portion of his ground for mining purposes, that he has abandoned his right to lateral support for the unleased portion of his land as against the leased portion, unless it is clear from the terms of the lease that the right has been abandoned.⁶⁰ On the other hand, the principle of lateral support has been held not to apply as between the claimholders in a diamond or other mine worked in the open, the right to such support being held to have been necessarily waived by the mere fact of their taking claims in the mine with the express purpose of digging.⁶¹ Nay, more, it has been held that, so far from being entitled to lateral support, each claimholder is bound by an implied understanding to work down his claim with reasonable diligence, and that, upon his failure so to do, he will be liable to make good to any neighbouring claimholder any damage resulting from his negligence.⁶² This duty to work down, however, does not attach to the owners of the ground with respect to abandoned claims, they having entered into no such implied undertaking.⁶³

Another large class of rights of ownership in land remains to be considered, which, on account of its

⁶⁰ *London and South African Exploration Co. v. Rouliot*, 8 S. C. 74.

⁶¹ *Murtha v. Von Beek*, 1 Buch. App. C. 121; *Griqualand West Diamond Mining Co. v. London and South African Exploration Co.*, 1 Buch. App. C. 256; *Hall v. Compagnie Française*, 1 H. C. 481; *McFarland v. De Beer's Mining Co.*, 2 H. C. 411; *Reed v. De Beer's Consolidated Mines*, 9 S. C. 371.

⁶² *Murtha v. Von Beek*, 1 Buch. App. C. 121; *Griqualand West Diamond Mining Co. v. London and South African Exploration Co.*, 1 Buch. App. C. 257, 263, 264; *Goode & Smith v. Hall*, 1 H. C. 526; *Hall v. Compagnie Française*, 1 H. C. 481.

⁶³ *Griqualand West Diamond Mining Co. v. London and South African Exploration Co.*, 1 Buch. App. C. 239.

importance, deserves a separate chapter to itself, namely, those which have reference to the use and flow of water.

CHAPTER XIII.

WATER RIGHTS AND RIGHTS OF DRAINAGE.

FOR the due and proper consideration of the rights of landowners to the water found upon their land, water may be most conveniently classified under one or other of the following three heads, namely, (1) rain, surface or flood water; (2) subterranean water; and (3) water running or flowing on the surface of the ground, but having its origin in underground sources and rising to the surface by means either of defined springs or fountains or of diffused ooziings or percolations.

With respect to rain-water falling on his land a landowner has an absolute right, it being his sole and undisputed property until it leaves his land or joins some perennial, or intermittent stream on such land.¹ He may deal with it as freely as with any other part of his property. He may use it at once for the purpose of irrigating his ground, or may collect it in tanks or reservoirs for future use, or may retain it upon his ground without making any use of it whatsoever, except for ornamental purposes, although the water, if allowed to flow down naturally, might be turned to account upon other ground situated lower

¹ Act 32, 1906, sec. 5.

down on the same catchment area.² He may even dispose of it to third parties to whom it would not naturally have flowed down, and may, in fact, deal with it in any manner he pleases subject only to the very wholesome maxim, which is of universal application under Roman-Dutch law, "*sic utere tuo ut alienum non lædas*," that is to say, so long as he does no injury to his neighbour's ground whether situated above, below, or on either side of him.³

The same rule applies to rain-water which does not fall on a man's own ground, but upon land situated higher up on the catchment area, and which flows naturally on to and across his ground by way of surface- or flood-water, whether in a diffused manner or in a defined channel which is dry except after rains.⁴ The rule does not, however, apply to storm-water which has found its way into the channel of a perennial stream, whereby the ordinary flow of such stream is temporarily increased in volume, whether for a longer or shorter period of time. With respect to such a stream it has been laid down that water flowing in the defined channel of the same, whether it be the moderate and usual flow or the usual flow increased by freshets or the more considerable floods after heavy rains, forms part and parcel of the perennial stream, and is subject, not to the rules applying to surface water, but to those which have reference to the common user of public streams by riparian proprietors.⁵

Subterranean waters are of two kinds, that is, they

² *De Pass & Co. v. Rawson*, 1 Roscoe, 133; Voet, 39 : 3 : 4; D. Roscoe, 133; G.2 : 34 : 14 D. 39 : 39 : 31 : pr., and 39 : 3 : 11.

3 : 1 : 91.

³ Voet, 39 : 3 : 4; D. 39 : 3 : 1 : Times, 916; *Meyer v. Johannesburg Waterworks Co.*, Hertzog, p. 15.

4, 11.

⁴ *De Pass & Co. v. Rawson*, 1

either find their way underground from one property to another in a diffused form by means of percolations or undefined and unknown channels, passages or veins, or otherwise they flow in defined underground channels, streams or rivers, of which there are several in South Africa, notably in the Transvaal. With regard to water which merely percolates or passes under his ground by means of undefined and unknown channels, the right of the landowner is as complete as with respect to rain-water falling on his ground, and may freely appropriate it to his own use by digging down upon the underground veins and thus intercept and raise the water to the surface.⁶ He may do this even though he may by so doing diminish the water supply in a well situate on a neighbour's ground, or decrease the flow of a spring rising on, or even of a public stream flowing over, the ground of the latter, provided he does so for the *bonâ fide* purpose of benefiting his own land.⁷

With respect to the right to underground waters flowing in a defined and known channel, the law has not been definitely laid down by judgments in contested cases, but from *obiter dicta* which have been pronounced from time to time it is pretty clear that such streams would be dealt with upon principles analogous to those which have been applied to public streams flowing above ground,⁸ as to which we shall treat further on.

Natural watercourses or streams of water flowing aboveground, but having their origin in underground

⁶ Voet, 8 : 3 : 6.

⁷ *Struben and others v. The Cape Town District Waterworks Co.*, 9 S. C. 68; *Vermaak v. Palmer*, 6 Buch. 35; *Meyer and others v. Johannesburg Waterworks Co.*,

Hertzog, p. 10, and 10 C. L. J. 168; Voet, 39 : 3 : 4; D. 39 : 3 : 1 : 12; 39 : 3 : 21; Groen., De Leg., D. 39 : 3 : 1 : 12.

⁸ *Vermaak v. Palmer*, 6 Buch. 35.

sources, are broadly and comprehensively divided into two great classes, viz. *public* and *private* streams.⁹

Under the term "public streams" are included all perennial rivers, whether navigable or not, and all streams which, although not large enough to be regarded as rivers, are yet perennial and are capable of being applied to the common use of the riparian proprietors.¹⁰ It is necessary to add also that even an artificial watercourse may, as between the proprietors of land through which it runs, acquire under certain circumstances all the qualities of a natural stream or watercourse, and be subject to all the rights attaching to the latter. Thus, where several riparian proprietors had for more than thirty years been accustomed to draw their share of the water out of a public stream by means of an artificial furrow or channel running through their farms in succession, and from which each was accustomed to divert the water to which he was entitled, as though it were itself the public stream from which the water originally came, it was held that the proprietors of the land through which the water ran were entitled to regard the artificial furrow as a natural watercourse and public stream, and to enjoy with respect to the water flowing in it all the rights of riparian proprietors, and that this right had its origin not in prescription, but in the quality which long usage and common user had impressed upon the watercourse.¹¹ It would appear, however, that, as in such a case the watercourse constituted in itself a burden or *servitus*

⁹ Voet, 43 : 12.

¹⁰ *Van Heerden v. Wiese*, 1 Buch. App. C. 7; *Retief v. Louw*, 4 Buch. 187; *De Wet v. Hiscock*, 1 E. D. C. 258; *Southey v. Schoombie*, 1 E. D. C. 286; Voet, 43 : 12; 39 : 3 : 1.

¹¹ *Myburgh v. Van der Byl*, 1 S. C. 360; *Municipality of Frenchhoek v. Hugo*, 2 S. C. 230, and 3 S. C. 346; *Kohler and others v. Baartman*, 12 S. C. 205; D. 39 : 3 : 26; 43 : 20 : 3 : 4.

acquæductus on each of the properties over which it passes, the owner of each servient tenement is entitled to point out what direction the watercourse shall take across his land, provided that the lower proprietors all get their reasonable share in a no less convenient manner and suffer no injury to their rights.¹²

For the purposes of the Irrigation Act of 1906 a "perennial stream" is defined as "a natural stream which in ordinary seasons flows for the greater part of the year in a known and defined channel and the water whereof is capable of being applied to the common use of the riparian proprietors. Provided that a stream which in part only of its course satisfies these conditions shall be deemed to be a perennial stream in so far only as regards such part:"¹³ and this was practically the definition of the term which had been adopted and recognized by the Courts prior to that enactment.¹⁴ "Intermittent streams" are distinguished from perennial streams, being defined for the purposes of the Irrigation Act of 1906 as being "streams which are not perennial streams, and into which the natural surface drainage waters flow from the lands of more than one riparian property. Provided that a stream shall not be deemed to be an intermittent stream above the highest point of its course at which the natural surface drainage waters from the lands of more than one riparian property unite, or for such lower portions of its course as satisfy the conditions of a perennial stream."¹⁵

Under the term "private streams" are included rivers and streams which are not perennial, and

¹² *Van der Byl v. Myburgh*, 2 S. C. 77.

¹³ Act 32, 1906, sec. 3 (c).'

¹⁴ *Vermaak v. Palmer*, 6 Buch.

28; *De Wet v. Hiscock*, 1 E. D. C. 257; *Southey v. Southey*, 15 Cape Times, 912, 913.

¹⁵ Act 32, 1906, sec. 3 (d).

streams which, although perennial, are so weak as to be incapable of being applied to the common use of the riparian proprietors.¹⁶

By the law of the Cape Colony, a private stream strictly so called is exactly in the same position as any other private property, and the owner thereof may therefore deal with it as freely as with any other portion of his private property. But it is different with a public stream which is subject, first, to certain rights on behalf of the public, and, in the second place, to certain rights on the part of the owners of lands situated along its banks or course, who are called riparian proprietors.

With respect to the water of an "intermittent" stream flowing on to or over his property, the rights of a riparian proprietor are somewhat more limited. He is entitled to use such water by diverting it on to his riparian land for the purpose of irrigating the same, and also to impound and store such water for that purpose and for domestic, agricultural, manufacturing, and drinking purposes. This right is, however, subject to the proviso that if at any time a lower riparian proprietor should consider that the upper proprietor is impounding or storing a greater quantity of the water of such stream than he can reasonably be expected to use for the purposes mentioned, it will be competent for such lower proprietor to appeal to a Water Court, which will then have the power to limit the upper proprietor to impounding or storing only such a quantity of the water as in the opinion of the Court he requires to impound or store

¹⁶ *Van Heerden v. Wiese*, 1 Buch. App. C. 7; *Retief v. Louw*, 4 Buch. 187; *De Wet v. Hiscock*, 1 E. D. C.

258; *Kock v. Theron*, 16 Cape Times, 177; Voet, 43: 12.

for such purposes.¹⁷ Upon non-riparian land, a riparian owner will not, as a general rule, be entitled to use the water of an intermittent stream, but, after the requirements of the riparian lands have been satisfied, he may obtain a special permit from the Water Court for the use of the surplus water on non-riparian land.¹⁸

With respect to the rights to the water of public streams, an opinion was expressed in an old case,¹⁹ decided as far back as January 12, 1830, by Burton and Kekewich, JJ., that, notwithstanding the *ex facie* absolute grant of any lands once the property of the Government, the Government remained *dominus fluminis*, and had the sole power from time to time to regulate the use of the water between all the parties, through whose lands the stream naturally flowed. It appears, however, from the body of the case, that this power of the Government could only be exercised by way of a legislative Act, which would amount to the same thing as saying that at the present day water rights may be regulated by Act of Parliament which, though theoretically true, is hardly likely to be done without the consent of all the parties interested, except by way of a general Act affecting all public streams alike, or at any rate a particular class of such streams.

The rights of the public to the waters of a public stream are mainly confined to rights of navigation, which rights may apply either to streams which are themselves navigable or streams which, without being navigable themselves, are affluents or tributaries to navigable streams, and as such help to make these

¹⁷ Act 32, 1906, secs. 7 and 8.

¹⁸ Act 32, 1906, sec. 9.

¹⁹ *De Wet v. Cloete*, 1 Menzies,

405. See also *Haupt*, App. v. *Clerk of the Peace, Stellenbosch*, Resp. 3 Menzies, 553.

latter navigable. Any interference with the water of a public stream, whereby the navigation of such stream or of another public stream may be injured, is forbidden in the public interests, and will be stopped by interdict. This, however, is a matter which belongs to the domain of public law, and therefore falls outside the scope of our present subject, which is the rights of private individuals, and more especially of landowners, to the waters of a public stream. These rights are regulated according to certain simple and clearly defined rules, which are not, however, always equally easy of application. One difficulty often lies in the case of South African rivers in deciding whether a particular natural stream or watercourse or so-called river is or is not a public or private stream, is or is not perennial in its flow.

The first obvious distinction to be drawn amongst streams rising out of the ground, whether by well-defined springs or fountains, or by way of diffused oozings which gradually collect and unite into one flowing stream, is between those which rise on a man's own ground and those which, rising elsewhere, merely flow through it. With respect to the former, there is no doubt that several eminent judges of the Supreme Court of the Cape Colony did in former times lay down some very strong views as to the rights of landed proprietors to all the water which rose upon their own land. Thus Cloete, J., in the case of *Retief v. Louw*,²⁰ decided in 1856, laid down that a landowner might deal with such a stream as freely as with any other part of his private property, might construct ponds or reservoirs, irrigate his lands with any part thereof, erect mills for his own or the public use, or

²⁰ *Retief v. Louw*, 4 Buch. 189.

turn the same to any lawful or beneficial purpose, so long as such right has not been restricted by a servitude acquired either by registered grant or by prescription. Watermeyer, J., again seems, in the case of *Dreyer v. Ireland*,²¹ decided in 1866, to have extended this rule even to streams running through a farm, where he stated: "As a general rule, no servitude in favour of lower proprietors existing, the upper proprietor may use water flowing through his land in any way he thinks proper;" and in the case of *Erasmus v. De Wet*,²² heard on Circuit in 1866, he held that an upper farm, by reason of its situation, was entitled to the use, and that the free use, of such waters of a stream flowing through it and lower farms as might be required by it. In the case of *Silberbauer v. Breda and the Cape Town Municipality*,²³ decided in the interval between the two last-mentioned cases, both these judges accepted it as undisputed law that in general a man may do whatever he pleases with water rising on his ground.

The authority upon which these judges mainly relied in laying down the above doctrine seems to have been a passage in Voet,²⁴ in which, in treating of the *servitus aquæductus* or servitude of water-leading, his object was to lay down the quite correct doctrine that the servitude can be acquired by prescription only when the user of the water has been adverse,²⁵ and he illustrates the doctrine by a particular instance, stating that when water rising on one property has for the period of prescription been allowed to flow down to a lower property naturally, there can be no question of

²¹ 4 Buch. 200.

²² 4 Buch. 204.

²³ 5 Searle, 231.

²⁴ Voet, 8: 3: 6.

²⁵ *Jordaan and others v. Winkelman and others*, 9 Buch. 79; *Southey v. Schoombie*, 1 E. D. C. 286.

adverse use, seeing that the upper proprietor has allowed it to flow down voluntarily, and not in consequence of any adverse action on the part of the lower proprietor; nor will it make any difference if the lower proprietor has diverted the water from the stream by means of dams or water-furrows or other works constructed upon his own land, because even in this there is nothing adverse to the upper proprietor, and therefore no acquisition of a servitude by prescription can be conceived. It would be otherwise, he says, if the lower proprietor has diverted the water from the stream by means of dams or other waterworks erected on the upper property, for in that case the user is adverse and prescription will run, and a right of water-leading will thus be acquired by the lower property over the upper. Unfortunately, Voet omitted to observe that, though in the former of these cases there could be no question of prescription, yet, by the mere fact that the water of the stream has flowed down for a period of thirty years from the upper to the lower property in a defined channel, the character of such stream has become changed from being a temporary and therefore private stream, as it was at the time when it first came into existence on the upper property, into a permanent, perennial and, therefore, public stream; and he consequently lays it down that "there is no reason why in such a case the owner of the upper property should not retain for himself the water rising on his property, and *therefore his own*, or grant it to whomsoever he wishes, to be led away by right of servitude and diverted from the lower properties to which it was accustomed to flow down," instead of bringing the case as it ought to be, as will be shown further on, under the rule applicable

to public streams. In stating that the water rising on a man's land is his own, Voet is begging the whole question. If every landowner were the absolute owner of all water rising on his land, it would be tantamount to saying that there are no public rights to the water of public streams unless such streams take their rise on public land, seeing that, if they rise on private land, the public rights may at any time be interfered with and rendered nugatory by the action of the owners of such land.²⁶ But that this is not the case will sufficiently appear from what has been stated above, and is also clearly laid down in other passages of Voet,²⁷ where he treats of the interdicts which are available to prevent anything being done in public rivers or on their banks whereby the navigation can be impeded, or whereby the ordinary and accustomed flow of the water may be altered.

The doctrine laid down by Cloete and Watermeyer, JJ., as above set forth, was first questioned in a judicial decision by the Privy Council in the case of *Breda* (Appellant) v. *Silberbauer* (Respondent),²⁸ decided in December, 1869, in appeal from the judgment of the Supreme Court in the case of *Silberbauer* v. *Van Breda and Municipality of Cape Town*.²⁹ In the course of the Privy Council judgment the following passage occurs: "Their Lordships have not before them the particular texts in Voet, upon which all the judges seem to concur in holding that, if the streams do rise on the appellant's land, he is by the law of the Colony entitled to do what he pleases with their waters. Their Lordships are not satisfied that

²⁶ *Meyer v. Johannesburg Waterworks Estate and Exploration Co.*, 10 C. L. J. 167; Hertzog, p. 8.

²⁷ Voet, 39 : 3 : 1, and 43 : 12, 13.

²⁸ 6 Moore's P. C. C., N. S., 319.

²⁹ 5 Searle, 231.

this proposition is true without qualification, or that, by the Roman-Dutch law as by the law of England, the rights of the lower proprietors would not attach upon waters which had once flowed beyond the appellant's land in a known and definite channel, even though it had its source within the land." It thus became clear that Voet's doctrine could not in future be accepted in its entirety and without qualification, and the views previously held on the subject had consequently to be reconsidered. The doubt suggested by the Privy Council was first converted into a judicial decision by Smith, J., in the Circuit Court case of *Vermaak v. Palmer*,³⁰ his judgment in which was afterwards confirmed by the Supreme Court on appeal.

The correct view has since been laid down in a series of decided cases, and reduced to a number of general rules, some of which have since been embodied in the Irrigation Act of 1806,³¹ to which we shall refer from time to time. We proceed to consider these rules and decisions in detail.

In the first instance, then, the owner of land is only entitled to the full and free ownership of all the water rising on his ground when such water has not for a long series of years flowed beyond his land in a known and defined channel on to lower lying lands.³² Where this is the case he may use the water for purposes of irrigation or any other purpose whatsoever, or he may dispose of it and grant a servitude over the same to a third party, even though the latter may not be the owner of lower lying land.³³ But this

³⁰ *Vermaak v. Palmer*, 6 Buch. 25.

³¹ Act 32, 1906.

³² Act 32, 1906, sec. 4.

³³ *Silberbauer v. Breda*, 5 Searle,

231; *Meyer and others v. Johannesburg Waterworks Estate and Exploration Co.*, 10 C. L. J. 159, Hertzog, p. 1.

is not the case where the water rising on the land of an upper proprietor has from time immemorial, or at all events for so long a period as thirty years, flowed beyond the limits of the land on which it rises on to lower lying land, not in the form of mere drainage water which percolates through the soil and ultimately reaches a stream on the lower land, but in a known and defined channel, the length of time being looked at not in order to ascertain whether any prescriptive rights have been acquired by the lower lands (it being even possible that the lower lands may have been unoccupied), but in order to ascertain the nature of the stream or, in other words, whether it is a public or private stream. Where the water of such a stream has flowed in a known and defined channel beyond the land on which it rises for thirty years and upwards, the stream is classed among public or perennial streams, and the rights to the water thereof will have to be regulated according to the rules laid down further on with respect to the water of public streams.³⁴ Nor need the known and defined channel necessarily exist above ground, for it may be subterranean. In the case of *De Wet v. Hiscock*,³⁵ for instance, it was held that evidence of the long-continued perennial flow of the water of a certain spring aboveground and of its then sinking into the earth and percolating underground for a considerable distance and then reappearing in a known and defined channel aboveground, was proof of its flowing in a

³⁴ Act 32, 1906, sec. 4; *Vermaak v. Palmer*, 6 Buch. 25; *Mouton v. Van der Merwe*, 6 Buch. 18; *De Wet v. Hiscock*, 1 E. D. C. 249; *Hiscock v. De Wet*, 1 Buch. App. C. 58; *Struben v. Cape Town District Waterworks Co.*, 9 S. C. 68; *Jordaan*

and others v. Winkelman and others, 9 Buch. 79; *Municipality of Frenchhoek v. Hugo*, 2 S. C. 230, and 3 S. C. 346; D. 39:3:26; 43:20:3:4.

³⁵ *De Wet v. Hiscock*, 1 E. D. C. 259. See also *Hiscock v. De Wet*, 1 Buch. App. C. 58.

defined channel underground and being one continuous stream. The lower proprietor is in such a case entitled, as regards quantity, to the right to the usual and accustomed flow only, and therefore if the upper proprietor, by operations on his own land, acquires an additional supply, he is not bound to allow such additional supply to flow down, but may treat it as his own just as if it had been the product of an independent spring which he had discovered upon his own land, and which had never flowed beyond it.³⁶

Reverting once more to the division of natural streams into private and public, it may be laid down generally that with respect to a private stream the rights of each owner of land over which it passes are as unlimited as are those of a landowner to the water of a spring rising on his ground, and which has not flowed beyond his ground in a known and defined channel for the space of thirty years or more.³⁷ To such streams the public has no right whatever, nor have lower proprietors any such right except in so far as they may have acquired it by long user or adverse prescription against the upper proprietor.³⁸

In the case of public streams the rights of each riparian proprietor are limited by the natural rights of the public, in so far as these are capable of being exercised, and by the rights of other riparian proprietors.³⁹ The rights of the general public to the waters of a public stream have already been treated of

³⁶ *Struben and others v. Cape Town District Waterworks Co.*, 9 S. C. 68. But see *Meyer and others v. The Johannesburg Waterworks Estate and Exploration Co.*, 10 C. L. J. 167; Hertzog, p. 8.

³⁷ Voet, 43: 12; Vinnius, Inst. 2:

1: 1; Act 32, 1906, sec. 4.

³⁸ *Van Heerden v. Wiese*, 1 Buch. App. C. 5.

³⁹ *Van Heerden v. Wiese*, 1 Buch. App. C. 5; *Struben and others v. Cape Town District Waterworks Co.*, 9 S. C. 68; Act 32, 1906, sec. 6.

above, when considering things public.⁴⁰ Our present inquiry is confined to the private rights of individuals, and more especially to the rights of owners of riparian land by which term is meant land which comes in contact with the flow of the stream either by abutting on it or by the fact that the stream flows through it,⁴¹ it being borne in mind that land which is riparian by nature may be deprived of its riparian character and rights by the express terms of an original grant.⁴²

For the purposes of the Irrigation Act of 1906, "riparian land" or "riparian property" has been defined as being land held under an original grant or under a deed of transfer of such grant, through which land or on or along the boundary of at least a part of which land the stream passes, or a subdivision of such land even if the stream does not pass through or on or along any part of the boundary of the subdivision.⁴³

Flowing water is by the common law of the Colony classed among things which are common,⁴⁴ and consequently the use of water running in a public stream is common to all those who are in a position to take advantage of it and use it, and more particularly to the proprietors of land along its banks or through which it flows.⁴⁵ As between these it is only fair and reasonable that what is common to all should be used in such a manner by each as to afford the greatest benefit, comfort, and convenience to all. The general good of all should therefore be the foundation of any

⁴⁰ See p. 11, above.

⁴¹ *Hough v. Van der Merwe*, 4 Buch. 148; *Meyer and others v. Johannesburg Waterworks Estate and Exploration Co.*, 10 C. L. J. 172; *Hertzog*, p. 16; *Lyons v. Fishmongers Co.*, L. R., I. App. 683.

⁴² *Olivier v. Fourie*, 16 S. C. 304.

⁴³ Act 32, 1906, sec. 3 (*f*). As to the effect of a change in the course of a stream, upon the rights of the parties, see Act 32, 1906, secs. 12-14.

⁴⁴ Voet, 1: 8: 3; Inst. 2: 1: 1; V. L., C. F., part 1: 2: 1: 6.

⁴⁵ *Retief v. Louw*, 4 Buch. 165.

doctrine with respect to the water-rights of riparian proprietors, and of any rules which may be laid down with respect to the use of the water of a public or perennial stream,⁴⁶ and the maxim, "*sic utere tuo ut alienum non lædas*," is of application at every stage of the exercise by any one riparian proprietor of his common right, that is to say, he is bound to use his rights in such a manner as not to do any injury to the rights of his co-proprietors.⁴⁷ The general doctrine being thus established, it only remains to consider how it can best be applied in practice, and the very first consideration must necessarily have reference to the nature of the property, the common use of which by the riparian proprietors is to be adjusted in as equitable a manner as is humanly possible. We have to consider that water is an absolute essential to the support and maintenance of both animal and vegetable life, and that it is capable of being used and is of the greatest utility also in many mechanical appliances. The purposes to which it can be applied at once therefore divide themselves into purposes of necessity and purposes of utility merely, the purposes of necessity in their turn being subject to various degrees of urgency. It will, of course, be admitted that the support of animal life is of more urgent importance than that of vegetable life, and in the social economy the production of the staff of life must necessarily be of greater importance than any mechanical process to which water can be applied. The uses, therefore, to which water can be applied fall almost naturally into the following order, namely: (1) the support of animal life, (2) the support or increase of vegetable

⁴⁶ *Retief v. Louw*, 4 Buch. 165, p. 180.

⁴⁷ *Ibid.*, p. 181.

life, and (3) the promotion of mechanical appliances.⁴⁸ Of these the first has, by reason of its greater urgency, been styled the primary or ordinary, and the others the secondary or extraordinary, use of water;⁴⁹ but the classification under the above three heads is clearly more comprehensive and exhaustive, and will therefore here be followed.

It follows, almost by the very nature of things, from the relative importance of these different uses, that it would not be equitable or fair that one riparian proprietor should be allowed to exercise each and every one of them in priority to and to the prejudice of a more urgent and pressing need in another, and accordingly it has been laid down that each of these uses shall be exercised by each of the riparian proprietors in turn in the order of their comparative urgency as above laid down.⁵⁰ The support of animal life being a matter of such immediate and primary importance, it would manifestly be unjust that an upper proprietor should be allowed to use the water for either of the secondary purposes to which it may be applied until the lower proprietors have been supplied with sufficient water for their primary wants, that is, for the support of animal life.⁵¹ Again, it would be manifestly unjust that an upper proprietor should be allowed to use the water for mechanical purposes if he thereby deprives the lower proprietors of the water required by them for support and increase of vegetable life, that is, for purposes of

⁴⁸ *Retief v. Louw*, 4 Buch. 181.

⁴⁹ *Hough v. Van der Merwe*, 4 Buch. 148; *Baillie v. Hendricks, Hoffman and Browne*, Kotze, 212; *Meyer v. Johannesburg Waterworks Estate and Exploration Co.*, 10

C. L. J. 171; Hertzog, p. 14.

⁵⁰ *Ibid.*

⁵¹ *Hough v. Van der Merwe*, 4 Buch. 148; *Retief v. Louw*, 4 Buch. 181; Act 32, 1906, sec. 6.

irrigation.⁵² But the question then arises to what extent each of these uses may be exercised by each of the proprietors in turn. As to the primary use of water for the support of animal life, we are again assisted by the very nature of water as a necessary of life. Bearing this circumstance in mind, and that self-preservation is the first law of nature, it follows that if the water of a stream running over the land of an upper proprietor is not more than is required for the support of animal life on such land, that is, for drinking and domestic purposes and the watering of live stock, when used in a reasonable and economical manner, the upper proprietor may exhaust the supply, and thus deprive the lower proprietor even of his primary use of the water, without the latter being entitled to any legal remedy.⁵³ But if the water is more than sufficient for the requirements of the upper property for the purposes of animal life, the excess must be allowed to flow down, or at least so much thereof as may be required for the animal wants of all the properties situated lower down the stream, before any portion thereof can be used by the upper proprietor for the support of vegetable life or the improvement of his agricultural lands by irrigation.⁵⁴

The rules with respect to the use of water for secondary or extraordinary purposes, that is, for irrigation or for mechanical appliances, are entirely different, such difference being due to the fact that these uses are based upon utility merely, and not upon absolute

⁵² *Retief v. Louw*, 4 Buch. 181; *De Kock v. Le Roux*, 15 S. C. 252.

⁵³ *Retief v. Louw*, 4 Buch. 181; *Hough v. Van der Merwe*, 4 Buch. 148; *Harding v. Queenstown Municipality*, 18 S. C. 223; *Baillie v. Hendricks, Hoffman and Browne*,

Kotze, 212; *Meyer and others v. Johannesburg Waterworks Estate and Exploration Co.*, 10 C. L. J. 171; *Hertzog*, p. 14.

⁵⁴ *Retief v. Louw*, 4 Buch. 181; Act 32, 1906, sec. 6.

necessity. The main difference consists in the fact that, want of water for irrigation purposes not being a matter of such life and death as is the case with the support of animal life, the upper proprietor will not be entitled to exhaust the supply to the prejudice of lower proprietors, except, perhaps, in the case of a stream which has been so reduced in bulk by the use of the water for primary purposes that what is left is too weak to be capable of being applied to common use, that is, is sufficient to be of some use for irrigation purposes to the upper proprietor, but is too weak to flow down to or to be of any use to the lower. No such case as this has ever been decided in the Courts of the Colony, but the suggestion of a possible exception to the rule in this case is based upon the very nature of the distinction between public and private streams as defined above, the differentiation of the two lying in the capacity of the former kind to be applied to the common use of the riparian proprietors, and in the latter not being so applicable.

But, leaving aside this possible exception, let us consider the case, which is the usual one, where, after all animal wants have been satisfied, a sufficient supply of water is left over to meet at least some of the irrigation requirements of all the proprietors. To lay down rules for such a case, we must recur to the fundamental doctrine laid down above that the stream, being a public stream, is intended for the common use of all the riparian proprietors, in accordance with which it will follow that an upper proprietor, being, for purposes of irrigation, not pressed by such urgent necessity as in the case of the preservation of animal life, is not entitled to use the water without regard to the requirements for irrigation purposes of those living

below him on the stream. He is, in fact, entitled to no more than a just and reasonable proportion of the water consistently with similar rights of irrigation in lower proprietors, which reasonable share he may, in the absence of any servitude to the contrary, make use of at all times, not being limited to any particular times or seasons;⁵⁵ but if he uses more than his reasonable share, he will be liable to be interdicted from so doing, and to an action of damages at suit of lower proprietors who have been injured by his wrongful act. What constitutes a just and reasonable use is entirely a question of degree which will depend upon the circumstances of each particular case,⁵⁶ for, in estimating what is a reasonable share, the relative extent of the riparian properties, the area and situation of the cultivated and cultivable ground in each property, and the extent of river frontage of each property will have to be taken into consideration.⁵⁷ It should be borne in mind also that by the term "just and reasonable share" is not meant any fixed quantity of water to which each proprietor will be entitled at all times and in all seasons, but only a just and reasonable proportion of such water as there may be in the stream at any particular time. The actual quantity to which each proprietor will be entitled at any time will have to be regulated according to the season. An upper proprietor cannot claim the right in a dry season to use the same quantity of water as he is accustomed to use in favourable seasons, if he thereby

⁵⁵ *Nel and others v. Potgieter and others*, 1 Buch. App. C. 24; Act 32, 1906, sec. 6.

⁵⁶ *Hough v. Van der Merwe*, 4 Buch. 148; *Baillie v. Hendricks*, *Hoffman and Browne*, Kotze, 212; *Meyer v. Johannesburg, Waterworks*

Estate and Exploration Co., 10 C. L. J. 171; *Hertzog*, p. 14; *Dow & Co. v. Mears & Co.*, 1 S. Af. Rep. 220.

⁵⁷ *Struben v. Collett* 16 S. C. 550.

deprives the lower proprietor of his proportionate share.⁵⁸

The manner in which the water is to be used by the riparian proprietors, so that each may receive his reasonable share, is a matter which may be arranged by agreement between the parties, but any arrangement which amounts to a departure from the natural flow of the stream to each proprietor in succession would be to that extent a burden upon each property to which it attaches, and, in order to be binding upon all future proprietors, will require to be registered or have to be established by prescription like any other servitude of water-leading.

It must further be observed that a riparian proprietor is entitled to a share of the water of a public stream merely because he is a riparian proprietor, and that he is bound to use his share of the water for the purposes of his riparian property only, and is not entitled to divert it to some other property of his which is not riparian, that is, which does not come in contact with the flow of the stream.⁵⁹ Nay, more, even where a riparian proprietor has diverted no more than his just and reasonable share of the water, and that for strictly riparian uses, he is bound to use such water as something in which the lower proprietors have a reversionary interest, and may not therefore use the water so diverted for irrigating other land of his which is not riparian, nor may he sell it to a third party who is not a riparian owner, but is bound to return to the stream, above its point of exit from his land, so much of the water diverted by him as has

⁵⁸ *De Kock v. Le Roux*, 15 S. C. 252; *Van Schalkwyk v. Hauman*, 14 S. C. 214; *Struben v. Collett*, 16 S. C. 550.

⁵⁹ *Struben and others v. Cape Town District Waterworks Co.*, 9 S. C. 76; *Olivier v. Fourie*, 16 S. C. 304; Act 32, 1906, sec. 6.

not been exhausted in the process of irrigating his own land.⁶⁰ The Court will not, however, interfere where by a long-established usage the upper proprietor has not returned the surplus water to the stream above its point of exit, but has discharged it into a tributary which joined the main stream below its point of exit indeed, but above the agricultural lands of the lower proprietor.⁶¹ It may also be that the Courts will refuse to interfere where it is proved that no possible injury can result to the lower proprietor from the diversion of water for other than riparian purposes, but the burden of proving that no such injury will be caused will be upon the person who makes the diversion.⁶² At any rate, it has been decided that the above rule, with respect to the return of the unexhausted water to the stream, will not prevent two or more upper proprietors from regulating amongst themselves, as they think fit, the distribution of their respective shares of water for irrigation purposes, provided they do not thereby deprive the lower proprietor of his reasonable share.⁶³

It is necessary to add that this limitation of the use of the water of a perennial stream to riparian lands has now been somewhat modified by legislative enactment. By the Irrigation Act of 1906 it is provided that if during any period of the year all such water cannot be utilized within the catchment area of any of the streams into which such water naturally flows, the Water Court may, subject to certain restrictions, authorize the diversion of the surplus water during

⁶⁰ *Hough v. Van der Merwe*, 4 Buch. 148; *Struben and others v. Cape Town District Waterworks Co.*, 9 S. C. 76; *Olivier v. Fourie*, 16 S. C. 304.

⁶¹ *Van Schalkwyk v. Hauman*, 14

S. C. 214.

⁶² *Per De Villiers, C. J.*, in *Struben and others v. Cape Town District Waterworks Co.*, 9 S. C. 76.

⁶³ *Olivier v. Fourie*, 16 S. C. 304.

such period either on to non-riparian properties within such catchment area or across the watershed of the stream into any other catchment area in which the surplus water can be usefully employed for irrigation.⁶⁴

It is almost unnecessary to add that a riparian proprietor is entitled to receive his share of the water in an unpolluted state, or, at least, not polluted to such an extent as to do damage, and, whenever he is damaged by such pollution, will be entitled to interdict the same and to claim compensation in damages. Everything depends upon the nature and extent of the pollution. Some matters are so noxious that the least quantity thrown into a stream would be sufficient to pollute it, whilst others, such as the dregs of beer-casks, would only be injurious if mixed with the water in unreasonable quantities. "*Sic utere tuo ut alienum non lædas*" is the maxim which is applicable to every case of this nature.⁶⁵

The question of the right to use water for the purposes of machinery or mechanical appliances generally can only arise after the irrigation requirements of all lower riparian properties have been satisfied;⁶⁶ and with respect to the use of water for mechanical purposes, it is enough to state generally that the use of water for such purposes must also be shared in a just and reasonable manner upon the same principle as in the case of irrigation.

Since the promulgation of the Irrigation Act of 1906, all disputes with respect to water rights have in the first instance to be referred to a Water Court and, save with the consent of all parties to any such dispute, no Court other than a Water Court, will have original

⁶⁴ Act 32, 1906, secs. 10 and 11.

⁶⁵ *Dreyer v. Cloete*, 7 Buch. 146.

⁶⁶ *Retief v. Louw*, 4 Buch. 148;
De Kock v. Le Roux, 15 S. C. 252.

jurisdiction to hear or adjudicate upon the same. An appeal will, however, lie to the Supreme Court, but the parties to a dispute may agree beforehand that the decision of the Water Court is to be final.⁶⁷

We have thus far confined our remarks to the rights of riparian proprietors as between themselves and to their remedies against each other, because, as a general rule, only riparian proprietors are in a position to get at the public stream flowing over their properties, so as to interfere with its flow or use. Other persons interfering with the stream would, as a general rule, be in the position of trespassers, and may be dealt with in that capacity; but still it is possible that other than riparian proprietors may have the right of access to a stream, and in that case it is sufficient to state that similar rights of action will lie against them for wrongful diversion as against a riparian proprietor. Thus where a Divisional Council, without any statutory right to do so, had raised an obstruction in the bed of a public stream where it flowed through the land of an upper proprietor, and had thus prevented the water from flowing down to the land of a lower proprietor, it was held that the lower proprietor was entitled to an order compelling the Council to remove the obstruction and to restore the stream to its former course, notwithstanding that this might entail a considerable amount of work; and the fact that the Council, in order to comply with the order, would have to go upon the lands of third parties not before the Court, was held to be no ground for refusing the order.⁶⁸

In addition to the rights which a riparian proprietor has to the use of the water of a public stream,

⁶⁷ Act 32, 1906, secs. 68, 70, and 72.

⁶⁸ *McGregor v. Divisional Council of Clanwilliam*, 15 S. C. 350.

he has certain rights to the bed and banks of such stream which are not possessed by any other member of the general public. Thus he may build upon the banks of the stream any works required for the protection of his lands and of the banks of the river from the action of the water, provided no injury is thereby done to upper or lower proprietors or to other landowners in the neighbourhood, and provided he does not interfere with the navigation of the stream, or divert the stream from its natural course; whereas a person who is not a riparian proprietor has no such right.⁶⁹

But if upper properties are subject to certain duties towards lower, with respect to water flowing on or across the former, lower properties in their turn are subject to corresponding duties towards upper. If upper properties are in certain cases bound to allow water to run down for the use of the lower, in accordance with the rules laid down above, lower properties are bound to receive water flowing down to them from higher ground by the laws of natural gravitation,⁷⁰ being subject to a sort of natural servitude to receive water so flowing down.⁷¹ To put it in another way, the upper proprietor is entitled to demand that the natural surroundings of his land and the natural laws to which these are subject shall be left undisturbed in so far as their continuance is essential to the proper and reasonable enjoyment of his right of ownership.⁷² And, though the lower proprietor is entitled to demand that no water or any other substance shall be discharged on to his ground

⁶⁹ Voet, 1: 8: 9.

⁷⁰ *Ludolph and others v. Wegner and others*, 6 S. C. 193; Voet, 8: 3:

6; 39: 3: 5; D. 39: 3: 1: 23.

⁷¹ Voet, 8: 2: 5; D. 39: 3: 2.

⁷² D. 39: 3: 1: 1, 23.

by the upper proprietor, which would not have come there in the ordinary course of nature, unless he is bound by some servitude to receive the same,⁷³ yet he will be bound to receive water flowing down to his ground, not in consequence of some act of an upper proprietor, but in obedience to natural laws,⁷⁴ and if he obstructs such flow, and damage is thereby caused to the upper proprietor, he will be liable to an action.⁷⁵ On the other hand, the upper proprietor in his turn will not be entitled to interfere with the laws of nature affecting his land or that of his lower neighbour to the injury of the latter, and will therefore not be allowed to alter the natural drainage of his ground in such a manner as to discharge or divert water on to his neighbour's ground which would not have flowed there naturally, or by means of some artificial structures, such as embankments, water-courses, plantations, and such like, to cause water, which would have flowed there naturally, to flow down differently from what it would naturally have done, as, for instance, in increased volume, or in a more rapid or stronger or more compressed stream, or in a polluted condition, if injury is thereby caused to the neighbour.⁷⁶ A man is not even allowed to let the rain-water drip from his roof on to a neighbour's ground, unless he has a *servitus stillicidii recipiendi* over it,⁷⁷ nor may he discharge his rain-water by means

⁷³ Voet, 39: 3: 2.

⁷⁴ Voet, 39: 3: 5 *in fine*, and 39: 3: 1: 1; G. 5: 35: 17.

⁷⁵ *Ludolph and others v. Wegner and others*, 6 S. C. 193; Voet, 39: 3: 2 *et seqq.*

⁷⁶ *Retief v. Louw*, 4 Buch. 173; *Kohne v. Harris*, 16 S. C. 144; *Austen Brothers v. Standard Diamond Mining Co.*, 1 H. C. 363; *Victoria Diamond Mining Co. v.*

De Beer's Mining Co., 1 Buch. App. C. 302, 305; *Colonial Government v. Mowbray Municipality and others*, 18 S. C. 453; *Trill and others v. Claremont Municipality*, 21 S. C. 362; *Enslin v. Zuidmeer*, 20 S. C. 443; *Solomon v. Du Toit's Pan Diamond Mining Co.*, 1 H. C. 1; Voet, 39: 3: 2; D. 39: 3: 1, 2, 6, 10, 13.

⁷⁷ G. 2: 34: 11.

of a down-pipe and spout into his neighbour's property unless he has a *servitus fluminis recipiendi* over it.⁷⁸ No action, however, will lie either against an upper or lower proprietor for damage due to an alteration in the natural drainage, if such alteration is due not to any work expressly constructed with that object, but merely in consequence of the enjoyment of his property and the cultivation of his land in a fair and reasonable manner, in the ordinary way, *e.g.*, by making irrigation furrows where there can be no cultivation without them,⁷⁹ or by cutting ditches for the drainage of his land, provided he does not collect the water into one united stream and then discharge it on to his neighbour's land in a more forcible and destructive manner than it would otherwise have got there naturally, for every one ought to improve his own land in such a way that he does not thereby deteriorate the land of his neighbour.⁸⁰ But where an upper proprietor is entitled to use a particular channel for the discharge of his surplus or rain-water, he will be entitled also to increase the ordinary flow into such channel even to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating his lands, and be not greater than is reasonable under the circumstances.⁸¹

But where water has flowed in an artificial ditch or channel for more than thirty years, it will be regarded as having flowed in that way since time immemorial, and the artificial channel will be regarded precisely in the same light as if it were a natural

⁷⁸ G. 2: 34: 16; Voet, 8: 2: 13.

⁷⁹ Voet, 39: 3: 4; D. 39: 3: 1: 3, 5, 7, 8, 15; 39: 3: 24.

⁸⁰ Voet, 39: 3: 4; D. 39: 3: 1: 4.

⁸¹ *Ludolph and others v. Wegner and others*, 6 S. C. 199; Voet, 39: 3: 4.

watercourse, and the lower proprietor will have no remedy if any damage is caused thereby.⁸² On the other hand, if the lower proprietor omits to clean such ditch, with the result that it becomes blocked up and the rain-water is thrown back upon the upper proprietor, the lower proprietor may be compelled by action either to clean the ditch himself or to allow the upper proprietor to clean it at his own expense.⁸³

The right to the retention of the natural character of the ground extends even to the case where that character has been altered, not by any artificial work, but by unusual natural agencies. Consequently, where an obstruction to or alteration in the natural drainage has been brought about by a flood or earthquake or other natural catastrophe, whereby a natural embankment is swept away or a natural ditch filled up, and damage is thus caused to the property of another, the owner of the ground upon which the obstruction or alteration has been caused cannot indeed be compelled to remove the same, but will be bound to allow the injured person, if he so wishes, to restore the ground to its original condition.⁸⁴

The action for damages due to artificial interference with the drainage will be against the owner of the ground upon which the work causing the interference is constructed, whether he constructed it himself or caused it to be constructed by a tenant or some one else, or did not prevent its being constructed when he was aware of it and might have prevented it.⁸⁵ Against any other than the owner it will not, as a general rule, lie, though a usufructuary will be equitably bound

⁸² *Ludolph and others v. Wegner and others*, 6 S. C. 199; D. 39: 3: 2: pr.

⁸³ D. 39: 3: 2: 1, 4.

⁸⁴ Voet, 39: 3: 2; D. 39: 3: 1: 23 *in fine*, and 39: 3: 2: 5-7.

⁸⁵ Voet, 39: 3: 2.

under similar circumstances; and it will lie against a tenant who has constructed some work without the knowledge or consent of the owner, the owner in such a case being only bound to allow the injured party himself to remove the work complained of.⁸⁶

The object of the action is usually the recovery of any damages that may have been caused by the work and the removal of the work at the expense of the defendant; but where the defendant, being the owner of the ground, neither constructed the work himself nor caused it to be constructed, and could not have prevented its being constructed, he will not be liable in damages, but will merely be bound to allow the removal of the work.⁸⁷ Consequently, a transferee of property, such as a purchaser, donee, legatee, or other particular successor of a person who has either himself or through others constructed a work on the property transferred, is merely bound to allow the work to be removed, an action for damages, however, and for the costs of the removal, lying against the transferrer or his estate.⁸⁸

The right of action ceases in case the work or obstruction complained of has existed since time immemorial,⁸⁹ or was constructed at a time when both the ground of the plaintiff and that of the defendant belonged to one and the same person by the owner of both, or was erected with the consent of the person injured or by virtue of a servitude imposed on his property.⁹⁰

The action obtains not merely between neighbouring landowners, but whenever the natural drainage of land is interfered with so as to do injury to the property

⁸⁶ Voet, 39: 3: 2.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Voet, 39: 3: 5; D. 39: 3: 2: pr.

⁹⁰ Voet, 39: 3: 5.

or legal rights of another. In any such case an action will lie for the restoration of the ground to its original condition, or at any rate for the removal of the cause of damage, and as a general rule for damages. Thus where a municipality, in making some public improvements, altered the natural flow of drainage water and collected and concentrated the water in a culvert, resulting in the washing away of a road leading to the plaintiff's property, the Court ordered the municipality to restore the road to its former state or to pay the plaintiff a sum of money sufficient to effect the repair of the road himself, but under the special circumstances of the case refused to allow him any damages.⁹¹ So also, where a municipality, whether bound by its constitution to do so or not, constructs drains or other appliances for the purpose of collecting and carrying off the rain-water in a manner other than it was by nature accustomed to flow, it will be obliged to construct these works in a proper manner, and if they are constructed in such a negligent and improper manner that damage may reasonably be anticipated therefrom, and damage to neighbouring properties does actually ensue, it will be liable for such damage.⁹²

The above are the general principles of our law on the subject of drainage, but the rights possessed under them may be waived either expressly or tacitly in the same way as the right to lateral support. They are regarded as tacitly waived in some respects as between

⁹¹ *Hall v. Claremont Municipality*, 16 S. C. 491.

⁹² *Manuel v. Cape Town Town Council*, 7 Buch. 107, and 3 Roscoe, 2; *O'Shea v. Port Elizabeth Town Council*, 12 S. C. 146; *Searight v. Cape Town Town Council*, 17 S. C. 78; *Henley v. Port Elizabeth Town Council*, 4 E. D. C. 303; *Kimberley*

Town Council v. Van Beek, 1 Buch. App. C. 101; *Kimberley Town Council v. Mathieson*, 1 Buch. App. C. 112; *Kimberley Town Council v. Murtha*, 1 Buch. App. C. 282; *Murtha v. Kimberley Town Council*, 1 H. C. 323. See also *Domingo v. Colonial Government*, 22 S. C. 101.

the holders of claims or mining properties in a mining area. As was laid down above, every man may use his land in the usual or ordinary way, but what is the ordinary method of such use with respect to surface rights is not the ordinary method as regards mining rights, the ordinary use of surface rights consisting in purposes of habitation or personal occupation on the one hand, and the cultivation of the soil on the other, whereas the ordinary use of mining property consists in the extracting of the minerals contained in the same by digging down into the bowels of the earth. And in the same way as the owner of the surface of the ground is entitled to cultivate the same to his best advantage, even if damage thereby ensue to his lower neighbour, provided he does so in the usual and ordinary way in which such cultivation is generally carried on, so a mineowner or claimholder in a mine is, in the absence of any express law or servitude to the contrary, entitled to dig down into the earth in search of minerals and to extract the same, even though damage is thereby caused to a neighbouring mineowner, provided he does so in a fair and reasonable manner, and in the way in which the particular kind of mining in question is ordinarily carried on. But while the owner of land who by artificial erections on the surface interferes with the natural drainage by diverting water from its ordinary course is liable, as shown above, to an action of damages at suit of any person who is injured by such diversion, no such liability will attach to a mineowner, inasmuch as the natural effect of mining operations carried out in the ordinary way, and even with the greatest care, is to cut through reefs of underground rock, with the result of tapping subterranean waters,

the existence or whereabouts of which was previously unknown, and thus diverting them from their natural course. This being so, it has been laid down that, if, in the ordinary course of mining within a mining area, water, which following the stratification of the country would or might otherwise have remained or gone elsewhere, finds its way by gravitation or percolation into the property or workings of another, there will, in the absence of negligence, be no cause of action, because there is no *injuria* or legal wrong. If, however, water is collected by artificial constructions or excavations, or diverted by an artificial channel or other artificial means, such as pumping, or sinking a shaft, or boring a hole, or by tapping the bed of a river, otherwise than in the ordinary course of mining operations, and damage ensues which would not otherwise have occurred, then, at all events in the absence of *vis major*, an action will lie.⁹³

CHAPTER XIV.

THE RIGHTS OF JOINT OWNERS.

WHERE there are several joint owners of land, holding such land in common in undivided shares, each is entitled to make a reasonable use of the common property, proportionable to his share therein, for the purposes for which such land is intended.¹ He is entitled to access to any and every portion of the land, except such as has by mutual consent of the

⁹³ *Reed v. De Beer's Consolidated Mines*, 9 S. C. 350, 361; *Goode and Smith v. Hall*, 1 H. C. 530; *Victoria Diamond Mining Co. v. De Beers*

Mining Co., 1 Buch. App. C. 300. But see *Bank of Africa v. Levin*, 3 H. C. 245.

¹ G. 3: 28: 4.

co-proprietors been allotted to the exclusive use and occupation of one or other of them. As to ordinary farm property, he is, in the absence of any special agreement to the contrary, entitled to depasture on the farm any number of cattle that would not be disproportionate to the extent of his share in the property,² and also to use a reasonable share of wood and water for domestic purposes.³ One proprietor, however, cannot, without the consent, either express or implied, of the others, carve out a portion of the farm for his own exclusive use, and consequently he may not convert grazing-ground into a garden for himself. But where the other proprietors, though objecting in the first instance, have allowed such a garden to be continued for two or three months without taking any steps to assert their rights, they will be held to have tacitly acquiesced in its continuance, and will have no right to allow their cattle to go into the garden and destroy the plants there growing, and, if they do, they will be liable in damages.⁴

In the same way one co-proprietor has no right to appropriate a part of the soil to his own use for the purpose of making bricks, whether to be used on the place or not, without the consent of the others. In the absence of such consent, he may be stopped by way of interdict from proceeding with the brick-making.⁵

Joint property cannot be converted to other purposes than those for which it is intended, nor can it be applied to new uses, nor its character changed, without the consent of all the proprietors, and if anything

² Voet, 10: 3: 9; G. 3: 28: 5.

354; 1 Roscoe, 23.

³ *Oosthuysen v. Plessis and another*, 5 S. C. 69.

⁵ *Oosthuysen v. Muller*, 7 Buch. 129.

⁴ *Swart v. Taljaard*, 3 Searle,

of the kind is attempted by one of the proprietors, he may be interdicted and compelled to restore the property to its original condition.⁶ Hence one joint owner is not entitled, as against the others, to convert pasture into arable land, nor to build upon such pasture land, nor can he indiscriminately cut down old or young trees on the common property;⁷ and on the same principle the owner of one of two conterminous properties may not cut down trees standing upon the common boundary-line, which are common property by reason of that circumstance.⁸ In case of any attempt of such a kind, however, the other co-proprietors should be expeditious in asserting their rights, for if they first suffer an alteration to the common property to be made and only seek redress after its completion, they will not be entitled to have the alteration removed, but will have to be satisfied to be merely indemnified for any loss or infringement of their rights caused thereby.⁹

Each co-proprietor may freely sell and dispose of his share of the common property without the consent and even against the wish of the others,¹⁰ but he may not sell, alienate, or encumber in any way the shares of his co-proprietors;¹¹ nor may the majority even of the owners sell or dispose of the shares of the minority,¹² unless indeed the property consists of mercantile goods which have been bought expressly with the object of being again sold, which may lawfully be sold in the

⁶ Voet, 10 : 3 : 7 ; Schorer, Note 441 ; V. D. K., Th. 777.

⁷ *Botha, Smit and others v. Kinneer, Kotze*, 215.

⁸ *Fleming v. Liesbeck Municipality*, 3 S. C. 268.

⁹ *Botha, Smit and others v. Kinneer, Kotze*, 215.

¹⁰ *Jewell and Rutter v. Hazell and*

Steer, 14 S. C. 16 ; Voet, 10 : 3 : 7. See also what has been said above (p. 61) about the alienation of the property of another.

¹¹ V. D. K., Th. 772 ; Voet, 18 : 1 : 14.

¹² Voet, 10 : 3 : 7 ; Schorer Note 441.

ordinary course of business without the express consent of all the joint owners, nothing being considered as being done in such a case which is opposed to the original intention of the parties, and the authority to sell being regarded as having been given at the beginning."¹³

Where there is a disagreement between co-proprietors as to the letting of lands, houses, or other common property which it is usual to let, but to the letting of which some of the proprietors are opposed, the minority will have to submit to the majority whenever the property is of such a nature that the use of it cannot conveniently be divided into shares.¹⁴ If, however, one of the co-proprietors is prepared to accept the lease of the property at the same rent as an outsider, he should be preferred to the latter.¹⁵

But where disputes arise between co-proprietors as to their respective rights, the most convenient way for settling these is by way of an action for a division of the property, that is, by a partition suit.¹⁶

The rights of the co-proprietors extend also to the title-deeds of the joint property, and are limited in the same way as their rights to the property itself. Consequently, it has been decided that one of the owners, who has the title-deeds in his possession, will have no authority to pledge them as security for the charges of a commission agent in attempting to raise a loan on mortgage of the common property without the consent of the others.¹⁷

¹³ Voet, 10: 3: 7; Schorer, Note 441.

¹⁴ *Ibid.*

¹⁵ Voet, 10: 3: 8; V. D. K., Th. 772, 773; R. Obs., part 3, obs. 81.

¹⁶ *Oosthuysen v. Plessis and*

another, 5 S. C. 74; G. 3: 28: 6; *Blignaut v. Rademeyer*, 18 E. D. C. 200.

¹⁷ *Jewell and Rutter v. Hazell and Steer*, 14 S. C. 16.

All profits and losses connected with the property must be shared proportionately between the owners, except losses occasioned by the bad faith or gross negligence of one of them.¹⁸ Each owner is also liable for his share of the expenses either necessarily or profitably or reasonably incurred by his co-owners upon the common property, and may be sued by them for the same without being obliged to sue at the same time for a division of the property.¹⁹ But where a person has incurred expenses with respect to property in his possession under the mistaken impression that it is his own sole property when he held it in common with others, Voet lays it down²⁰ that he will have no right of action against his co-proprietors, his only remedy being by way of retention of the property in his capacity as *bonâ fide* possessor, until a proportionate share of the expenditure has been refunded to him. But though the liability of each owner for the expenses is proportionate to his share in the property, this is not the case with respect to the costs of an action brought by an outsider against the owners jointly for the recovery of such expenses, for which the owners will be liable in equal shares.²¹

As regards the mode of procedure for the division of common property, in cases in which minors are concerned the Court will sometimes order a partition upon motion, without the necessity of bringing an action, whenever it is obviously to the interest of the minors that a partition should be effected.²² In all other cases the procedure will have to be by way of action.

¹⁸ G. 3 : 28 : 9.

¹⁹ *European Diamond Mining Co. v. Royal Diamond Mining Co.*, 2 Buch. App. C. 137 ; *Kannemeyer v. Havinga and others*, 19 S. C. 251 ; Voet, 10 : 3 : 3 ; V. D. K., Th. 777.

²⁰ Voet, 10 : 3 : 3.

²¹ *Campher's Curator v. Marnitz*, 6 S. C. 121. See also *Auret v. Pienaar*, 3 S. C. 40.

²² *Re Campher*, 5 S. C. 75.

The action for a partition will lie whenever several persons own property jointly under one and the same title or in undivided shares under separate titles, that is to say, whenever each is owner of a proportionate share, without any particular portion having been assigned and transferred to him.²³ It is sufficiently wide to embrace not only the actual partition of the land, but also the adjustment of all disputes arising out of the joint ownership, including even claims for damages in respect of waste committed by some of the co-owners.²⁴

The action is applicable not only to cases of full ownership, but also to cases in which property is held jointly under a quitrent title or usufruct; but in the last-mentioned the partition will only hold good during the subsistence of the usufruct, and will attach only to the life interest of the usufructuaries, and will not be binding upon the real owners of the property upon the termination of the usufruct.²⁵ It will also be allowed to joint *bond fide* possessors,²⁶ but not to persons who hold property jointly under a lease, or at pleasure (*precario*), or as depositaries, or feloniously, or by stealth.²⁷

It will not, however, lie with respect to property which, either from its legal character, or its physical nature, or the special circumstances of the case, is indivisible.²⁸ Thus it will not apply to a prædial servitude which is in its nature indivisible, though it will lie with respect to the enjoyment of such servitude whenever it cannot be exercised or enjoyed by all

²³ Voet, 10 : 3 : 1.

²⁴ *Oosthuysen v. Plessis and another*, 5 S. C. 74; *Parkin v. Parkin*, 2 Buch. 136; Voet, 10 : 3 : 1, 3.

²⁵ *Parkin v. Parkin*, 2 Buch. 136;

Voet, 10 : 3 : 1; 7 : 2 : 1.

²⁶ Voet, 10 : 3 : 1.

²⁷ Voet, 10 : 3 : 2, 3.

²⁸ G. 3 : 28 : 3.

those jointly entitled to it at one and the same time, as in the case of the servitude of water-leading (*servitus aquæductus*), or of drawing of water (*servitus aquæ-haustus*).²⁹ In the case of certain common property also, which has in itself some of the elements of a prædial servitude, this action will not be admissible, as in the case of a common passage or wall or ditch, or a common vestibule or entrance to two adjoining houses, or trees growing upon the common boundary of two adjoining properties.³⁰

A division will not be allowed where it has been expressly prohibited for a certain time, a perpetual prohibition being void.³¹

The right to this action is never prescribed, for however long a time the property may have been held in common.³²

In making a division the Court should aim at what is most fair and equitable to all the parties, and adopt the course which is most favourable and beneficial to all. In the absence, therefore, of any agreement to the contrary, wherever one of the joint owners has other land adjoining the common property, it is no more than fair that that portion of the latter, which adjoins his own separate property, should be assigned to him as his share.³³ When it is impracticable for the Court itself to make a proper division, it is usual to appoint arbitrators for the purpose, who will be able to proceed to the locality in question and decide on the spot what will be the most fair and equitable division.

Where prior to the action the property has

²⁹ Voet, 10: 3: 2, 5.

³⁰ Voet, 10: 3: 5.

³¹ G. 3: 28: 6.

³² Voet, 10: 3: 6.

³³ Voet, 10: 3: 3; G. 3: 28: 8; Schorer, Note 443.

actually been divided by mutual agreement between the co-owners, and occupied by them in defined and distinct shares, the Court will order the division to be made and subdivisinal transfers passed in accordance with such agreement,³⁴ and a similar rule is to be applied where the co-proprietors have occupied defined shares for the period of prescription, that is, thirty years,³⁵ provided that such occupation has been open, peaceable, and *bonâ fide*.^{36a}

In case the physical division of the property in a fair and equitable manner is either wholly or partially impracticable, the Court will make such order as justice or the equity of the case may require, for instance, by giving a larger or more valuable portion to one, subject to a money payment by him to the rest,³⁶ or by assigning the whole of the property to one and ordering him to pay a fair compensation to the rest.³⁷

Even before actual division, however, one of several co-proprietors of land in undivided shares may have such a special interest in the portion of the ground occupied by him with the consent of the others as to entitle him to sue by himself for trespass upon the same without joining the others.³⁸ But whenever the ownership of the property or a servitude or mortgage upon the same is in question, all the co-proprietors will have to be joined either as plaintiffs or defendants.³⁹ Consequently, it has been decided that all the joint owners of property

³⁴ *Van Wyk v. Van Wyk*, 2 E. D. C. 403; *Oosthuysen v. Plessis and another*, 5 S. C. 74; *Judd v. Fourie*, 2 E. D. C. 56.

³⁵ Voet, 10: 3: 6.

^{36a} *Le Roux v. Malherbe*, 2 Buch. App. C. 192.

³⁶ *Hoets v. De Smidt*, 2 Searle, 3.

³⁷ *Dickson v. Stagg*, 3 S. C. 115; Voet, 10: 3: 1, 3; Schorer, Note 444.

³⁸ *Strydom v. Tiran*, 3 Buch. 163.

³⁹ *Van der Walddt v. Hartmann and others*, 1 Roscoe, 16; *Oosthuysen v. Plessis and another*, 5 S. C. 69.

pecially hypothecated must be summoned before the property can be declared executable, even though they have renounced the exception *duobus vel pluribus reis debendi*.⁴⁰

There are several kinds of real rights which are so often spoken of as common that they have come to be somewhat incorrectly regarded as common property, *e.g.*, a common wall, hedge, fence, or ditch, by which term is meant a wall, hedge, fence, or ditch situate upon the common boundary of two adjoining or conterminous properties. It is submitted, however, that these common rights are not common property in the strict sense of the term, but are rather in the position of being the several property of each of the owners of the adjoining properties up to the actual middle line or common boundary, with a reciprocal servitude as regards that portion of such wall, fence, hedge, or ditch which is beyond such line or boundary. The term common is also applied to the case of what is called a common waterfurrow, that is, a servitude of water-leading or passage for water over an upper farm in favour of several lower properties, which the latter are entitled to exercise by means of one and the same furrow or watercourse running across the upper property.⁴¹ All these matters will therefore be more conveniently considered under the heading of Servitudes.

⁴⁰ *Lombard Bank v. Storm*, 1 S. C. 360; *Botha v. Dreyer*, 1 E. Menzies, 500.

⁴¹ *Myburgh v. Van der Byl*, 1

D. C. 74.

CHAPTER XV.

LAND TENURE IN THE COLONY—PERPETUAL QUITRENT.

THE land tenure obtaining in the Colony at the present day, if we exclude mere leasehold, is of two kinds, namely, freehold and perpetual quitrent, and it therefore remains to consider in what respects a perpetual quitrent-holding of land differs from the rights of full ownership as above laid down.

Perpetual quitrent tenure was introduced into the Colony by the Proclamation of Sir John Francis Cradock of August 6, 1813. Immediately previous to the promulgation of this Proclamation three forms of land tenure had been in use, namely, freehold, loan leases, and quitrent leases for the term of fifteen years. With respect to the last of these it is not necessary to say much here, as they were either actually or practically swept away by that Proclamation. It is sufficient to state that the system of fifteen years' quitrent leases was first introduced in 1732, and that it differed very little from an ordinary lease for that term, the conditions being that the ownership in the ground remained vested in the Government, which retained the right of resuming possession at the end of the fifteen years, and that the tenant should have the boundaries traced out and the land brought into such cultivation as it was capable of, within the first three years, previous to the expiration of which the lease was not transferable. The leases were, however, renewable, and the renewal was seldom refused except for good reasons.

As regards the loan leases, it would appear that originally small plots of garden ground were granted by the Government of the Dutch East India Company on "loan" pure and simple. These loans were in course of time gradually enlarged to allow of the grazing of stock, no rent being charged, but the Government retaining the right of terminating the holding at any time. Later on these loan tenures were converted into loan leases or concessions of the use of the land for a certain period, subject to the annual payment of a certain fixed sum, which was called a *recognitie*. The building or homestead on such a loan place was called the *opstal*, and could be sold by the tenant¹ or bequeathed by will; but such sale or bequest could not alter the nature of the tenure so as to release the purchaser or legatee from its incidents, nor did the purchaser become entitled to any claim for compensation for improvements or for a refund of the purchase price as against the Government in the event of a subsequent withdrawal of the grant. As a matter of fact, however, the grants were never withdrawn except in consequence of a breach of the conditions of the same.

The extent of these loan places was by custom defined to be an area with a certain radius round a fixed central point called the *ordonnantie*, and which was generally the homestead or else some spring or other prominent object in the landscape. No written leases of these loan places were at first issued, but in 1743 these tenures were converted into *loan freeholds*, as they were called, of a certain limited extent of sixty morgen, an annual quitrent being payable, and an immediate payment of a sum in cash down upon

¹ *In re D. G. van Reenen, Van Reenen v. Reitz and Breda*, 2 Menzies, 316

receipt of the title-deed or *erf-grondbrief*, which was accompanied with a diagram framed after actual survey. In some districts an annexed out-station or *legplek* in the karroo was assigned to the loan place or allowed to be used by the tenant of the latter, but the right to such out-station did not necessarily go with the loan place upon its conversion into perpetual quitrent, as hereafter mentioned, each case having to be decided upon its own merits.²

On August 6, 1813, Sir John Cradock's Proclamation was promulgated, the object of which was to establish a certainty of tenure and security of title by granting to the holders of loan places, upon their applying for the same, a *perpetual quitrent* grant of the lands, to be held by them upon the terms laid down in the Proclamation. Though this Proclamation was aimed in the first instance at the conversion of loan leases, the issue of the fifteen years' quitrent leases had ceased since June 1, 1811, and, as the leases previously granted gradually fell in, they either came to an end or the holders thereof were allowed to convert them into *perpetual quitrent* holdings in terms of the Proclamation. Original grants in perpetual quitrent, unconnected with any previously existing loan lease or fifteen years' quitrent holding, were also granted in terms of the Proclamation.³ When, therefore, the Proclamation had come into full working and had its full effect, there continued in existence in the Colony only two forms of land tenure which conferred any real rights or rights of ownership on the holders thereof, namely, freehold and perpetual quitrent. For

² Proclamation, Aug. 6, 1813, sec. 15.

³ For the history of this land tenure, see *De Villiers v. Cape*

Divisional Council, 5 Buch. 53, and a Report of the Surveyor-General presented to the House of Assembly in 1876 (G. 30, 1876).

both of these forms of tenure proper written title-deeds, accompanied by diagrams, were issued, and a proper registration of the same made in the Colonial Debt Registrar, which was at first kept in the office of the Colonial Secretary, but since 1828 in the office of the Registrar of Deeds.⁴

The title-deeds (*erf-grondbrief*) under the Proclamation was only granted after actual survey of the ground by a sworn surveyor, and after a proper diagram had been framed by him and forwarded to the Government;⁵ and after the issue of such grant no alienation of any part of such quitrent land was considered as legal before it had been surveyed, a diagram thereof made, and a proper transfer thereof passed *coram lege loci* and registered in accordance with the law applicable to other immovable property.⁶

The provisions of the Proclamation of August 6, 1813, though in terms applying only to the case of loan places converted into perpetual quitrent, have been held, by virtue of the condition inserted in every perpetual quitrent grant in the following terms: "The land thus granted being further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure," as well as by usage, to apply equally to every original grant in perpetual quitrent which has not been the result of a conversion from a loan place.⁷ Where the above condition is not inserted in the grant or is inserted under circumstances which

⁴ Ord. 39, 1828.

⁵ Proclamation, Aug. 6, 1813, sec. 13.

⁶ Proclamation, sec. 10.

⁷ *De Villiers v. Cape Divisional Council*, 5 Buch. 50, and 6 Buch. 105; *Kimberley Divisional Council v.*

London and South African Exploration Co., 2 Buch. App. C. 84; *Divisional Council of the Cape Division v. De Villiers*, L. R., 2 App. C. 567; *Colonial Government v. Logan*, 20 S. C. 343.

would make it not referable to the perpetual quitrent established by the Proclamation, the provisions of the Proclamation will not be applicable.⁸ Whenever, however, these provisions are applicable, the rights of the tenant will be regulated not by the common law with respect to quitrent or *emphyteusis*, but by the terms of these provisions and of the grant itself.⁹

The holder of a perpetual quitrent grant is entitled to all the rights of a freeholder, except those expressly reserved by the Crown under the Proclamation.¹⁰ Thus he is entitled "to hold the land hereditarily, and to do with the same as he may think proper, in like manner as with other immovable property; as also, should he deem advisable, to sell or otherwise alienate, with the usual previous knowledge of the Government, either partly or wholly, as free and allodial property," and he is also entitled to the ownership "of all mines of iron, lead, copper, tin, coals, slate, or limestone."¹¹ It is further provided that "in all judicial decisions regarding *perpetual quitrent* the same rights, laws, and usages shall be observed, which have hitherto been acted upon, or which may hereafter be established, enacted, and followed in judicial decisions with respect to freehold lands,"¹² and that "this *perpetual quitrent* shall, further, not be liable to any other burthens but

⁸ *Kimberley Divisional Council v. London and South African Exploration Co.*, 2 Buch. App. C. 88, and 3 H. C. 125; *Webb v. Giddy*, L. R., 3 App. C. 908.

⁹ *The Colonial Government v. Fryer and Huysamen*, 4 S. C. 313; *Webb v. Giddy*, L. R., 3 App. C. 908; *De Villiers v. Cape Divisional Council*, 5 Buch. 50, and 6 Buch. 105; *Kimberley Divisional Council*

v. London and South African Exploration Co., 2 Buch. App. C. 84.

¹⁰ Proclamation, Aug. 6, 1813, sec. 6; *Colonial Government v. Fryer and Huysamen*, 4 S. C. 316; *Wallace v. Randall*, 3 E. D. C. 89; *Webb v. Giddy*, L. R., 3 App. C. 980.

¹¹ Proclamation, Aug. 6, 1813, secs. 3, 4.

¹² *Ibid.*, sec. 6.

those to which all freehold lands are already subject, or which may hereafter be further prescribed.”¹³

Where the extent of land actually transferred falls short of the extent specified in the quitrent grant and diagram, the grantee will be entitled to a proportional reduction of the rent.¹⁴

A sale and transfer of the quitrent land by the grantee, if otherwise unobjectionable, can only be set aside, if it be a colourable and fraudulent one, *e.g.*, if what purported on the face of it to be a transfer out and out, in point of fact reserved to the vendor rights in connection with the land, whilst throwing the burden of paying the rent upon a man of straw.¹⁵

On the other hand, in all such grants the “Government reserves the right to mines of precious stones, gold, and silver, as also the right of making and repairing public roads and raising materials for that purpose on the premises,”¹⁶ and that even for the repair of roads lying outside the limits of the land from which the materials are taken.¹⁷ Further, “in all places adjoining the sea or communicating with the sea by inlets therefrom, the rights of the owner are reserved, with the power of reassumption of any quantity of land, not exceeding twenty morgen, paying the proprietor for such buildings as he may have erected, according to a fair valuation, provided such ground be wanted for public purposes; and if given up by the Crown, it shall not be transferred to another

¹³ Proclamation Aug. 6, 1813, sec. 11.

¹⁴ *Liesching, Executor of Fichat v. Colonial Government*, 3 Menzies, 417.

¹⁵ *Colonial Government v. Fryer*, 3 S. C. 371.

¹⁶ Proclamation, Aug. 6, 1813, sec. 5.

¹⁷ *Stellenbosch Divisional Council*

v. Myburgh, 5 S. C. 8; *Slabber v. Bell*, 4 Searle, 3; *Logan v. Colonial Government*, 18 S. C. 133; *Colonial Government v. Logan*, 20 S. C. 343; *Heathcote v. Colonial Government*, 20 S. C. 50. For further authorities on this subject see under “Expropriation,” p. 59 above.

individual, but revert to the proprietor or his representative.¹⁸ Where the Crown has reassumed the land for public purposes, it is entitled to claim transfer, and in that case the transfer should set forth the public purposes for which the land is required.¹⁹

CHAPTER XVI.

SERVITUDES.—GENERAL PRINCIPLES.

As pointed out above, ownership consists in the right of exercising all the rights of ownership and of excluding all others from such exercise. In the absence of any evidence to the contrary, all ownership is presumed to be full and complete and free from all restrictions,¹ but it may be limited by the imposition upon the property, which is its object, of some real burden which shall attach to it, and form part and parcel of it as a defect in or deduction from the ownership thereof. This may be done in one or other of three ways, namely, by way of *fideicommissum*, or servitude, or mortgage. Of *fideicommissum* we have already treated above,² and of mortgage we shall treat further on. We shall deal here with the subject of servitudes.

A servitude may be defined as a detachment of some of the rights of ownership from the ownership of some particular property and the conferring of the same upon some person other than the owner thereof,

¹⁸ Proclamation, Aug. 6, 1813, sec. 5.

¹⁹ *Colonial Government v. Stephan*

Brothers, 17 S. C. 393.

¹ Schorer, Note 206.

² See Book I., p. 161 *et seqq.*

or the attachment of the same to the ownership of some other property.³ In other words, it is a right constituted over the property of another, by which the owner is bound, in order that another person may draw some advantage out of it, to suffer something to be done with respect to his property, or himself to abstain from doing something on or with respect to it;⁴ that is to say, it is the right to make property *serve* or *be servient* to some one other than the real owner, whence the term *servitude*.⁵

The following general principles flow almost from the very nature of servitudes:—

(1) As a general rule a servitude can only attach to corporeal things.

(2) A man can have no servitude over his own property.⁶

(3) With the exception of the servitudes *oneris ferendi* and *altius tollendi*, a servitude cannot, as a general rule, consist in the owner of the servient tenement being compelled to do something,⁷ but only in his being obliged to permit something to be done by another, or in his abstaining himself from doing something, on his own property.⁸

(4) No servitude is maintainable unless it confers some benefit upon the person or property for whose benefit it is established,⁹ but this benefit need not necessarily be of a pecuniary nature. A usufruct, for instance, may exist with respect to property from which no pecuniary benefit can possibly be derived,

³ *Dreyer v. Lettersted's Executor*, 5 Searle, 99; Voet, 1: 8: 20.

⁴ V. L., vol. 1, p. 280; V. L., C. F., part 1: 2: 14: 1.

⁵ Voet, 7: 1: 1.

⁶ Voet, 8: 4: 14; V. L., vol. 1, p. 283.

⁷ Voet, 8: 4: 17; 7: 1: 1. But see *Louw v. De Villiers*, 10 S. C. 324.

⁸ *Retief v. Louw*, 4 Buch. 174; Voet, 8: 4: 17.

⁹ Voet, 8: 2: 10.

and even over property the possession of which may entail a pecuniary loss.¹⁰

(5) A servitude constitutes a real right over the servient property itself, which may therefore be prosecuted against any and every possessor thereof.

(6) Servitudes being onerous in their nature, clear evidence is required, either of grant or of prescription or of some other mode in which they are created, before the Court will allow any such right to one man over another's property.¹¹ In case of doubt, everything is presumed to be free from servitude, and consequently every servitude must be interpreted strictly according to the letter,¹² and must be exercised in the manner provided for in the grant, and so as to be as little troublesome as possible to the owner of the servient property.¹³

(7) The grant of a servitude is supposed to carry with it every right, without which such servitude cannot be properly enjoyed.¹⁴

(8) There can be no servitude of a servitude.¹⁵ In this connection two cases may be supposed, namely, (a) where the owner of a dominant tenement, which is entitled to a servitude, grants a servitude, *e.g.*, a *usus* or *usufructus*, of such servitude to a third party, and (b) where the owner of the servient tenement grants a servitude of a servitude, *e.g.*, a *usus* or *usufructus* of a right of way or water-leading, to a third party. The former would, of course, be wholly invalid,

¹⁰ Voet, 7:1:14.

¹¹ *Peacocke v. Hodges*, 6 Buch. 69.

¹² Schorer, Note 206.

¹³ *London and South African Exploration Co. v. Rouliot*, 8 S. C. 96; *Meintjes v. Oberholzer and others*, 2 Searle, 268, 269; *Krige v. Wilson*, 2 S. Af. Rep. 53; G. 2:35:6.

¹⁴ Per Cloete, J., in *Retief v. Louw*, 4 Buch. 192; *Kimberley Mining Board v. Stamford*, 1 Buch. App. C. 129; *Steyn v. Zeeman*, 20 S. C. 224; Voet, 8:2:18; 8:4:16.

¹⁵ *Engelbrecht and others v. Brits and others*, (1906) T. S. 287; Voet, 8:4:7.

for the owner of a servient tenement is not bound to allow the extension of the servitude beyond the terms of his original grant.¹⁶ In the latter case the grant will be sustained, but will amount to a direct personal servitude of water-leading,¹⁷ as will appear later on.

Servitudes are either personal on the one hand, or prædial or real on the other.¹⁸

A personal servitude is one which is constituted in favour of a particular individual, without reference to his being the owner of any particular property, and it terminates generally at the death of such person.¹⁹

A prædial or real servitude is one which is constituted for the benefit or in favour of a particular *prædium* or landed estate or piece of ground over another, the former in such a case being called the dominant tenement (*prædium dominans*) and the latter the servient tenement (*prædium serviens*).²⁰

Prædial servitudes are servitudes *par excellence*, and when the term servitude is used by itself without any qualification, prædial servitudes are generally intended.²¹

Personal servitudes may be constituted over either movable or immovable property, and, according as they are so constituted respectively, they are themselves regarded as either movable or immovable property.²² A prædial servitude is classed under immovable property, that is to say, in the same class both as the property in whose favour it is granted and as that which is subject to it.²³

¹⁶ Voet, 8: 4: 7, 13, 14.

¹⁷ Voet, 8: 4: 7.

¹⁸ G. 2: 33: 2; V. D. L. 167.

¹⁹ Voet, 7: 1: 1; G. 2: 33: 2;
²⁰ 38: 1; V. D. L. 167.

²⁰ *Dreyer v. Ireland*, 4 Buch. 198,

199; Voet, 7: 1: 1; 8: 1: 2, 4; G. 2: 33: 2-5; V. D. L. 167.

²¹ Voet, 8: 1: 1; 8: 4: 15.

²² Voet, 1: 8: 20.

²³ *Ibid.*

CHAPTER XVII.

PERSONAL SERVITUDES.

AMONGST personal servitudes the principal are *usufruct*, *usus*, and *habitatio*, though it cannot be denied that servitudes, which are in their nature prædial, may, by the will of the parties constituting them, be converted into personal, so as to terminate upon the death of the grantee and not to be transmissible to his heirs. Instances of the kind occur where a right of road or footpath across, or of pasturing cattle or drawing water upon, the land of another is given to a particular person.¹

On the other hand, servitudes which are personal in their nature, inasmuch as they are granted to a particular person and not constituted for the benefit of a particular dominant tenement, may by mutual agreement, duly registered against the servient property, be made to partake, in the matter of permanency, transferability, and otherwise, of the nature of a prædial servitude. Amongst these the most important is the grant of the right to mine or dig for metals or minerals in or under the land of the grantor. Such right will not give the grantee any ownership or *dominium* in the metals or minerals in question, which can only be acquired by transfer of the ground itself, but will amount to a servitude on such land merely.²

¹ Voet, 8: 1: 4; per Watermeyer, 37, 5.
J., in *Dreyer v. Ireland*, 4 Buch.

² *Le Roux and others v. Loewenthal*, (1905) T. S. 742.

CHAPTER XVIII.

USUFRUCT.

USUFRUCT is either life usufruct or perpetual or hereditary usufruct.¹ Of the latter class there were only two kinds known to the common law, namely, feudal tenure and *emphyteusis* or quitrent tenure.² Feudal tenure has, of course, never been known in the Colony, whilst the quitrent tenure of the common law was something quite different from the perpetual quitrent tenure of our statute law. The former was a hereditary usufruct or personal servitude upon the ground of another, subject to the payment of an annual quitrent to the owner thereof; whilst the perpetual quitrent of Sir John Cradock's Proclamation,³ as shown above, is a form of ownership in land subject to a personal servitude over such land in favour of the grantor, in the form of an annual money payment or quitrent to be paid by the holder or owner to the grantor.⁴

A new form of perpetual or hereditary usufruct, analogous to the *emphyteusis* or quitrent tenure of the common law, has been created incidentally by our mining laws with respect to claims in mines and diggings, to which the claimholders have a *jus in re* in the form of a perpetual personal servitude entitling them to dig and mine and search for precious stones, and minerals in such claims, so long as they comply with the provisions of the mining laws on the subject, and provided that such claims have neither been abandoned by the claimholders themselves nor declared

¹ G. 2: 38: 10.

² G. 2: 40: 1.

³ Proclamation, Aug. 6, 1813.

⁴ V. D. L. 172.

abandoned by the proper mining authorities.⁵ This right to search will continue even as regards the soil taken by the claimholders out of the claims in the process of mining, even after they have undergone one process of searching, and therefore with reference to the *débris* and tailings deposited on the mining areas and the depositing grounds in the actual occupation of the claimholders.⁶

This right of servitude does not give a claimholder any right of ownership in the soil of the claims or in any diamonds in such claims which have not yet been actually found by him. He only becomes the owner of such diamonds as have been actually found and appropriated by him. At the same time, he is in the lawful occupation of the ground, and as such occupier he may prevent trespassers from coming on to his claims, and may recover damages for trespasses actually committed; but if some one else comes on to his ground and finds a diamond and sells and delivers it to an innocent purchaser, such diamond not being his property, he cannot follow it up or reclaim it from the purchaser.⁷

In order to be valid this right of servitude requires to be registered in the office of the Registrar of Claims, where alone also the transfer and hypothecation of such claims can be validly effected, just as the transfer and registration of other immovable property and of real burdens upon the same have to be effected in the office of the Registrar of Deeds. The subject of claims,

⁵ *Preston & Dixon v. Biden's Trustee*, 1 Buch. App. C. 347; 1 H. C. 282, 302; *London and South African Exploration Co. v. Bultfontein Mining Board and others*, 7 S. C. 49; *London and South African*

Exploration Co. v. Rouliot, 8 S. C. 89.

⁶ *De Beer's Consolidated Mines v. The Colonial Government*, 9 S. C. 101.

⁷ *White v. Adams*, 14 S. C. 152.

however, is a large and special one, which falls outside the scope of this work and for which the reader is referred to the mining laws.

Life-usufruct or usufruct in the modern sense of the term is the right granted by the owner to another person, who is called the usufructuary, to use and to enjoy the fruits or produce of his property, without trenching or making any inroads upon the property itself, all the other rights of ownership, and especially the right of disposition, remaining vested in the owner.⁸ The term was in the first instance confined to the use and enjoyment of such things as could not perish or be diminished with use,⁹ but in course of time it was extended by custom to a sort of quasi-usufruct of things perishable, such as money, corn, and wine, in which case not necessarily the same articles had to be returned *in specie* to the owner at the expiration of the usufruct, but articles of the same kind, quantity, and quality, or their value.¹⁰ This last occurs most usually in the case of the usufruct of a whole estate, in which all kinds of things are necessarily mixed up together, both such as do and such as do not perish with use.¹¹

A usufruct also, though in the first instance confined to corporeals, may now be established over all sorts of property, movable as well as immovable, corporeal as well as incorporeal, provided only that it be not *extra commercium*.¹² It may apply not only to a single thing, but also to the whole of the grantor's estate or to some other *universitas rerum*, such as a

⁸ Voet, 7: 1: 3; V. L., vol. 1, p. 210; V. D. L. 167.

Th. 377.

⁹ G. 2: 38: 5, 6; 2: 39: 2, 19; V. D. L. 170; V. L., vol. 1, p. 210.

¹¹ G. 2: 39: 20; V. D. K., Th., 378.

¹⁰ Voet, 7: 5: 1, 3, 4; V. D. K.,

¹² Voet, 7: 1: 14; 7: 5: 1, 3, 4.

flock of sheep.¹³ A usufruct of a whole estate would include all the property belonging to such estate, movable as well as immovable, corporeal as well as incorporeal, and even rights of action.¹⁴

A usufruct may be constituted either by agreement, accompanied by quasi-delivery, or by will, as where the ownership of a thing or of a whole estate is left to one person and the usufruct of the same thing or estate to another.¹⁵ It is generally granted for life,¹⁶ but may also be granted for a certain time or until the fulfilment of a certain condition,¹⁷ in which cases, however, it will nevertheless terminate upon the death of the usufructuary, if this should take place before the arrival of the time or the fulfilment of the condition.¹⁸ It may also be made to take effect at a certain time or upon the fulfilment of a condition, in which case the fruits and profits will, pending the arrival of the time or the fulfilment of the condition, go to the owner.¹⁹

CHAPTER XIX.

THE LEGAL EFFECT OF USUFRUCT.

THE effect of a usufruct when legally constituted is to deprive the owner of all the rights implied under the term usufruct, and to vest the same in the usufructuary. This naturally implies that the owner will not during the subsistence of the usufruct be entitled to do anything to the property which may interfere with the

¹³ Voet, 7: 1: 14.

¹⁴ Voet, 7: 1: 15, 16.

¹⁵ Voet, 7: 1: 7; 7: 5: 2; 7: 6: 2; G. 2: 39: 8, 9; Schorer, Note 27; V. L., vol. 1, p. 217.

¹⁶ G. 2: 39: 1.

¹⁷ *Watson v. Fraetas*, 16 S. C. 263.

¹⁸ Voet, 7: 4: 11, 12.

¹⁹ Voet, 7: 1: 5.

proper enjoyment by the usufructuary of his rights, except with the consent of the latter; but, provided there be no such interference, he may deal with the ownership in the property in any way he pleases, and may alienate it by way of sale, gift, or bequest, or in any other manner whatsoever.¹

In the first place, then, the usufructuary is entitled to the use, and therefore to the possession, administration, and control, of the usufructuary property, whether it be a single thing or an estate;² and in the latter case he may sue for debts due to the estate, and may even call up mortgage bonds and sue for money due upon the same, whenever it is to the interest of the estate that this should be done.³ In the case of the usufruct of an inheritance, the usufruct only attaches to the balance of the estate after the debts and legacies have been paid.⁴

The right of use applies not only to the usufructuary property itself, but also to all the accessions to and accessories of the same, and, consequently, to all prædial servitudes belonging to the property,⁵ as also to all accessions to land caused by alluvion, but not to islands appearing in a river opposite to such land, although such islands become the property of the owner of the land by reason of his ownership of the land.⁶

The usufructuary property may be used in any manner in which it is customary to use property of that kind or in which it was originally intended to be used, though the owner himself may not have used it in that particular manner;⁷ but the usufructuary

¹ Voet, 7:1:20.

² *Furnivall v. Cornwall's Executors*, 12 S. C. 6; Voet, 7:1:32.

³ Voet, 7:1:33, 34.

⁴ Voet, 7:1:40.

⁵ Voet, 7:1:22.

⁶ Voet, 7:1:23; Schorer, Note 226.

⁷ Voet, 7:1:21, 22, 26.

may not change the form of the thing in any material particular, nor convert it to any purpose other than that for which it was originally intended.⁸ In any case he must use the property in a kindly manner, according to the opinion of prudent men, and act the part of a careful, nay, even of a very careful, owner, for if he misuses the property he will be liable in damages,⁹ and may even be interdicted.¹⁰

A usufructuary who has without any right erected buildings on usufructuary land, may not again pull them down or remove them.¹¹

The usufruct of land includes the rights of hunting and fishing and of letting or otherwise disposing of such rights.¹²

In addition to the use of the property, the usufructuary is also entitled to the fruits and profits derivable from the property and its accessions, whether these consist of the natural produce or increase of land or animals or of civil fruits, such as the rent of land or other property or the interest of money invested.¹³ Such profits may not only be enjoyed personally, but may also be sold or otherwise disposed of to others,¹⁴ and all accumulations of such profits belong to the usufructuary.¹⁵

Under the term "produce or fruits" is included everything which, according to the customs of the country, can in any way be regarded as such, whether it refers to the increase or products of animals, or to garden produce or crops, or to natural products, such as reeds, rushes, and such trees or parts of trees as it is

⁸ Voet, 7: 1: 21.

⁹ Voet, 7: 1: 41; G. 2: 38: 9.

¹⁰ Voet, 7: 1: 33.

¹¹ Voet, 7: 1: 21.

¹² Voet, 7: 1: 23.

¹³ Voet, 7: 1: 21; V. L., vol. 1, pp. 210, 211.

¹⁴ Voet, 7: 1: 22.

¹⁵ *Ibid.*

usual, according to the customs of the country, to cut down annually, whether by way of pruning or thinning out or otherwise.¹⁶

With regard to the natural or industrial produce of land, it must be observed that, though the usufructuary may be entitled to gather them during the subsistence of the usufruct, until they are so gathered and separated from the ground they belong to the owner of the ground, and not to the usufructuary, and that they can only be acquired by the latter by separation from the soil, that is, by picking the fruit or cutting down the crops. Such fruits and crops as remain ungathered or uncut at the expiration of the usufruct, do not go to the usufructuary or his heirs, but to the owner, in however mature a condition they may be and however fit or ready to be gathered or cut.¹⁷ The usufructuary or his executor will, however, be entitled to be recouped the expenses incurred by him in the sowing or cultivation of the fruits or crops left by him ungathered or uncut.¹⁸

Fruit trees and trees intended for ornamental purposes may not be cut down under any circumstances,¹⁹ nor may trees which do not fall under the denomination of annual produce; but these last may be cut down when they are required for use upon the land itself, such as for firewood, for fencing, for props to vines, etc., and for necessary repairs to houses,²⁰ provided this can be done without any material injury to the property itself. Large timber trees the usufructuary is not allowed to cut down, unless the

¹⁶ Voet, 7 : 1 : 22; 22 : 1 : 21; G. 2 : 39 : 7.

¹⁷ Voet, 7 : 1 : 28; G. 2 : 39 : 13; Schorer, Note 228; V. L., vol. 1, p. 217.

¹⁸ Schorer, Note 228.

¹⁹ Schorer, Note 226; V. L., vol. 1,

p. 216; V. L., C. F., part 1 : 2 : 15 : 9.

²⁰ *Houghton Estate Gold Mining Co. v. McHattie & Barrat*, 1 Off. Rep. 92; Schorer, Note 225; V. L., C. F., part 1 : 2 : 15 : 9.

terms of the grant or custom admit of it.²¹ In any case the usufructuary is obliged to exercise his rights to cut down trees according to the discretion of a careful man,²² and where trees which do not fall under the denomination of annual produce are cut down or are blown down or otherwise destroyed, they will have to be replaced by planting other trees in their stead.²³ A usufructuary is also bound to keep up the numbers of a flock or herd left to him in usufruct out of the increase yielded by the same from time to time.^{23a}

As regards the right to cut firewood, it is submitted that, as firewood does not come under the denomination of annual produce, the usufructuary, though he may cut firewood for his own requirements on the land, will not be entitled to cut the same for purposes of sale.

As regards the produce and increase of animals, it may be laid down that the milk, hair, and wool, and also the young of cattle and other live stock belong to the usufructuary, but that in the case of the usufruct of a flock of sheep or goats this is only true with respect to the young in so far as the flock, with the addition of such increase, is in excess of the original number, the usufructuary being bound out of the increase to replace any of the original stock which may have died.²⁴

With reference to minerals and metals, the general rule derivable from the somewhat conflicting authorities would seem to be that the usufructuary may dig for and extract the same from the earth, but that he has only the usufruct of them, that is, is only entitled to the interest on the proceeds thereof, the minerals and

²¹ Voet, 7: 1: 22.

²² *Ibid.*

²³ Schorer, Note 226; V. L., vol. 1, p. 216.

^{23a} *Beneke v. Van der Vijver*, 22 S. C. 529.

²⁴ Voet, 7: 1: 26.

metals not coming under the denomination of fruits or produce, but forming part of the land in which they are imbedded, and therefore belonging to the owner of the ground.²⁵ Some of the authorities make an exception in the case of those minerals and metals which renew themselves, and which were spoken of by them as *renascentia*,²⁶ which term, it is submitted, can in this country only apply to the salt found in salt-pans.

“Civil” fruits, namely, such as consist in rents, interest on investments, annuities, and other money payments coming due upon the usufructuary property, accrue *ipso jure* to the usufructuary without any necessity on his part of first recovering payment of the same.²⁷ The question may therefore frequently arise, when the usufruct terminates during the currency of a year or other term provided for periodical payments, how much of any particular payment is to go to the usufructuary, and how much, if any, to the owner. It is held that in such a case, if the payment in question becomes due in consideration of a continuous use, such as for rent due under a contract of lease, whether of movable or immovable property, or interest upon money put out at interest, it will have to be divided proportionally between the usufructuary and the owner.²⁸ But the same rule will not hold with respect to payments of uncertain occurrence, such as fines or penalties, which will go wholly to the usufructuary if they fall due during the subsistence of the usufruct.²⁹

It must be added with respect to all fruits that the term “fruits” is restricted to the net profits on the produce of the usufructuary property after payment of

²⁵ Voet, 7: 1: 24; Schorer, Note p. 217.
226.

²⁸ Voet, 7: 1: 30.

²⁶ Voet, 7: 1: 24; 6: 3: 11;
V. L., vol. 1, p. 211.

²⁹ Voet, 7: 1: 31; Schorer, Note
224, par. 5.

²⁷ Voet, 7: 1: 25; V. L., vol. 1,

the expenses connected with the cultivation, production, and recovery of them, whether by the ordinary agricultural or pastoral processes or by judicial process, since these all fall on the usufructuary.³⁰

The rights of the usufructuary, as well to the use, as to the enjoyment of the fruits of the property, are limited to the period of the subsistence of the usufruct. He may consequently not sell, mortgage, or pledge, or in any other way encumber the property itself.³¹ It is even said by some of the text-writers that he cannot transfer or cede the usufruct itself to another,³² but all that is meant by them is that he cannot cede or transfer the usufructuary property itself, or by cession or transfer entirely disconnect himself from the usufruct, for there is nothing to prevent his disposing of his life-interest in the same, that is, the right of using and enjoying the fruits of the property until his own death, whether by way of sale, lease, loan, or leave to hold at pleasure,³³ provided that any such arrangement does not bind the property beyond his own lifetime.³⁴ He may even pledge his right of usufruct, and his life-interest in the same may also be taken in execution or sold in his insolvent estate, unless this has been expressly provided against in the grant.³⁵

On the other hand, the usufructuary is subject to certain duties. Whenever called upon to do so by the person who is entitled to the ownership, he is bound to frame an inventory of the usufructuary property,³⁶

³⁰ Voet, 7 : 1 : 28, 35, 36 ; Schorer, Note 225.

³¹ G. 2 : 39 : 5 ; V. L., vol. 1, pp. 214, 218 ; V. D. L. 171 ; *Executors of Hitge v. Botha*, 21 S. C. 289.

³² G. 2 : 39 : 4 ; Schorer, Note 224, par. 6, and Note 229 ; V. D. K., Th. 376 ; V. L., vol. 1, p. 214.

³³ Voet, 7 : 1 : 32 ; V. L., vol. 1,

p. 218.

³⁴ *Parkin and others v. Lippert and others*, 12 S. C. 184 ; Voet, 19 : 2 : 16.

³⁵ Voet, 7 : 1 : 32 ; V. L., vol. 1, p. 214.

³⁶ Voet, 7 : 9 : 2 ; G. 2 : 39 : 20 ; Schorer, Note 224.

and to give security for its restoration at the termination of the usufruct in the same condition in which it was received, ordinary wear and tear alone excepted,³⁷ and free and unencumbered.³⁸ In the case of a quasi-usufructuary the security will have to be for the return of a thing of the same kind or its value.³⁹

Where there are several co-usufructuaries, all will have to give security,⁴⁰ and where the usufruct is left to them jointly, each will have to give security to the full amount to meet the possibility of the whole of the usufruct going to one of them in the future by the *jus accrescendi*.⁴¹

The security is to be given to the person or persons to whom the property is to go or is intended to go at the termination of the usufruct; and if there are several of them, to each, and if it is doubtful to which of two persons it will eventually go, to both.⁴²

This obligation to frame an inventory and give security cannot be dispensed with by the testator, by whom the usufruct is bequeathed,⁴³ but it may be dispensed with by the grantor of a usufruct *inter vivos*,⁴⁴ and so it may be, of course, by the person who is entitled to it.⁴⁵

A usufructuary will not be entitled to claim the use and enjoyment of the property until he has both framed the inventory and given the security, when these are insisted upon;⁴⁶ and if he wilfully refuses to give the security, when demanded, he will be deprived

³⁷ Voet, 7 : 4 : 5 ; 7 : 9 : 1 ; V. L., vol. 1, pp. 212, 214 ; V. D. L. 171.

³⁸ G. 2 : 39 : 3 ; Schorer, Note 224.

³⁹ Voet, 7 : 9 : 1 ; G. 2 : 39 : 20 ; Schorer, Note 224 ; V. L., vol. 1, p. 212.

⁴⁰ Voet, 7 : 9 : 4.

⁴¹ Voet, 7 : 9 : 5.

⁴² *Ibid.*

⁴³ Voet, 7 : 9 : 9 ; 36 : 3 : 6 ; G. 2 : 39 : 3, 20 ; Schorer, Note 224, par. 1 ; V. D. K., Th. 371 ; V. L., vol. 1, p. 215.

⁴⁴ Voet, 7 : 9 : 8, 9.

⁴⁵ Voet, 7 : 9 : 9.

⁴⁶ *Ibid.*

of all the benefit of the usufruct in the meantime, and, if he subsequently complies with the demand, the fruits which have been collected in the meanwhile will not go to him, but will have to be added to the capital and will go to the owner at the termination of the usufruct.⁴⁷

The security need not necessarily be claimed at the beginning of the usufruct, but may be demanded at any time during its currency, and, if the request is not complied with, the property itself may be claimed by way of *vindicatio*, nor can such right ever be prescribed.⁴⁸

The security may be given in any form the Court may consider sufficient, whether by way of sureties or the personal security of the usufructuary or otherwise.⁴⁹

As already pointed out, the expenses of gathering or recovering the fruits or profits fall upon the usufructuary as a matter of course. He is also bound by the very nature of his holding to pay the ordinary expenses required for keeping the property in a state of repair.⁵⁰ He will therefore be obliged to keep buildings in repair, to replace fruit and ornamental trees which may happen to die;⁵¹ but expenses necessarily incurred for the protection of the property itself will have to be made good by the owner.⁵² A usufructuary is not bound to restore houses which collapse through age, and, if he does so, he may claim to be refunded by the owner;⁵³ nor is he bound to insure houses against fire or to maintain insurances

⁴⁷ Voet, 7: 9: 3; Schorer, Note 224, pars. 4, 7.

⁴⁸ Voet, 7: 9: 11.

⁴⁹ Voet, 7: 9: 3; Schorer, Note 224, par. 4.

⁵⁰ Voet, 7: 1: 36; Schorer, Note 225.

⁵¹ Voet, 7: 1: 36; G. 2: 38: 9; 2: 39: 5; V. L., vol. 1, p. 216; V. D. L. 171.

⁵² Voet, 7: 1: 35, 38; Schorer, Note 225.

⁵³ Voet, 7: 1: 36; G. 2: 39: 5; Schorer, Note 225; V. D. L. 171.

previously entered into,⁵⁴ though a different rule, according to Van der Keessel, obtained in Holland with regard to ships.⁵⁵ Useful expenses may also be recovered by the usufructuary at any rate to the extent to which the property has been enhanced in value thereby.⁵⁶

The usufructuary has to pay all taxes upon and other dues attached to the property itself, such as quitrent or lease rent, but not the interest due upon a mortgage on the property, which is a personal obligation of the owner, except in the case of the usufruct of a whole estate.⁵⁷

During the currency of a usufruct the usufructuary will be entitled to an action *in rem* to enforce his usufruct against any possessor of the usufructuary property or against any person who interferes with or disturbs him in the possession or enjoyment of the same, and especially against the owner of the servient property.⁵⁸

CHAPTER XX.

THE EXTINCTION OF USUFRUCT.

USUFRUCT is extinguished by the death of the usufructuary,¹ for, since it is a personal right, it cannot be transmitted to the usufructuary's heirs, unless it has been expressly so provided by the grantor, in which case there is not so much one usufruct as two usufructs, one to the first usufructuary and the other

⁵⁴ *Executors of Meyer v. Meyer*, 1 S. C. 377.

⁵⁵ V. D. K., Th. 370.

⁵⁶ Schorer, Note 228.

⁵⁷ Voet 7: 1: 37, 39; V. L., vol.

1, p. 216.

⁵⁸ Voet, 7: 6: 2, 4.

¹ G. 2: 39: 13; V. L., vol. 1, p. 217.

to his heirs, that is, to the first generation of such heirs.²

A usufruct to a corporation expires at the dissolution of the corporation or otherwise at the end of a century.³

A usufruct left in undivided shares to several persons only expires upon the death of all of them.⁴

Usufruct is further extinguished by merger, whenever the usufructuary acquires the ownership of the usufructuary property.⁵ It is also terminated by renunciation or abandonment on the part of the usufructuary,⁶ and is lost by non-user for the period of prescription, that is, thirty years.⁷

Usufruct ceases also with the total destruction of the thing itself⁸ and when it undergoes a complete change of form by *specificatio*,⁹ nor is the usufruct revived if the property is afterwards reconstructed or restored to its original form.¹⁰ In the case of a particular usufruct of a house, for instance, the usufruct is not continued over the ruins or *débris* when the house is burnt down, nor will it attach to the house if afterwards rebuilt; but it is otherwise where the house is merely included in the universal usufruct of a whole estate.¹¹

A usufruct terminates also upon the arrival of the day or the fulfilment of the condition provided for in the grant,¹² unless the usufructuary dies before, in which case the usufruct ceases with his death.¹³

² Voet, 7: 4: 1.

³ *Ibid.*; G. 2: 39: 15; V. L., vol. 1, p. 217.

⁴ Voet, 7: 4: 1; G. 2: 39: 15.

⁵ Voet, 7: 4: 2, 3; G. 2: 39: 17; V. D. K., Th. 376; V. L., vol. 1, p. 217.

⁶ Voet, 7: 4: 3; G. 2: 39: 16; V. L., vol. 1, p. 217.

⁷ Voet, 7: 4: 6; G. 2: 39: 18; V. L., vol. 1, p. 219.

⁸ Voet, 7: 4: 8; G. 2: 39: 14; V. L., vol. 1, p. 217.

⁹ Voet, 7: 4: 9.

¹⁰ Voet, 7: 4: 10.

¹¹ Voet, 7: 4: 8.

¹² Voet, 7: 4: 11.

¹³ Voet, 7: 4: 12.

A usufructuary does not forfeit his usufruct for mere ordinary misuse or abuse of the property, which may be sufficiently provided against by the usufructuary security;¹⁴ but the usufruct will be forfeited whenever there has been such a serious abuse of the property as to result in a considerable and permanent deterioration of the same, and also where the usufructuary makes a fraudulent sale of the property.¹⁵ It is essential for the purposes of a forfeiture that the misuse be wilful and culpable, or fraudulent.¹⁶ If, for instance, a definite mode of enjoying the usufruct is prescribed in the grant, *e.g.*, for purposes of pasturage, and the pasturage is converted into arable land, the usufruct will be lost through not being exercised in the proper manner.¹⁷

At the termination of the usufruct the property itself may be claimed back by *vindicatio*, and in the case of quasi-usufruct of things which perish with use, the things themselves or their value may be recovered by a *condictio* or action on the case.¹⁸ The owner will also be entitled to compensation in damages for any injury done to the usufructuary property.¹⁹

CHAPTER XXI.

USUS AND HABITATIO.

It is not necessary to say much about the personal servitudes of *usus* and *habitatio*, as they are seldom met with at the present day. Suffice it to say that *usus*

¹⁴ Voet, 7: 4: 5; V. L., vol. 1, p. 219.

vol. 1, p. 218.

¹⁵ Schorer, Note 224; V. L., vol. 1, p. 218.

¹⁷ Voet, 7: 4: 5.

¹⁸ Voet, 7: 9: 11; V. D. L. 171.

¹⁹ Voet, 7: 9: 11.

¹⁶ Schorer, Notes 226, 229; V. L.,

is the servitude by virtue of which the usuary or party entitled to it may make every use of the property subject to it, which its nature and character will admit of, saving the substance itself of the property.¹ It differs from usufruct in this, that whilst usufruct includes both the right to use the property and to enjoy the fruits thereof, *usus* is restricted to the former.²

The right to such use is strictly personal, and is limited to the usuary himself and the members of his household, and will vary in extent with the numbers of such household.³ The usuary may consequently not make over the use of the property to a third party, whether by way of sale, lease, or gift.⁴

Usus in regard to land consists in the right to occupy the same and to take such fruits, vegetables, flowers, hay, or wood, as are required for daily consumption, but not to transfer such right to others either gratuitously or for value; with regard to a house, in the right to inhabit the same with one's family and visiting friends, but not to let it as a whole, though, if it be too large for the usuary's own family, he may let so much of it as he does not require for his own family; and, with regard to animals, in the right to use them for draught purposes, to take their manure, and also milk for consumption, but not to appropriate the other produce of the same or the increase.⁵

A very special form of *usus* occurred in the case of the *Colonial Government v. Brady*,⁶ in which the respondent had executed what was called a "deed of servitude" in favour of the Government, by which he

¹ Voet, 7:8:1; V. D. L. 171.

² Voet, 7:8:1, 3; G. 2:44:2-4;
V. L., vol. 1, p. 210.

³ Voet, 7:8:2.

⁴ Voet, 7:8:4.

⁵ G. 2:44:6.

⁶ *Colonial Government v. Brady*,
17 S. C. 404.

granted certain rights and privileges to the latter, amongst which was the following: "The said Brady shall provide so much additional land on his farm as may be necessary for the purposes of a station, with sidings, platforms, passenger and goods sheds." The Court held that, though the grant was called a deed of servitude, it differed from any of the ordinary rights of servitude and that the rights of the Government thereunder were *sui generis* and depended entirely upon the peculiar nature of the business carried on by the Railway Department, which could not be properly carried on without the exclusive use and control of the railway lines and platforms, and that consequently the respondent was not entitled to have a verandah projecting over a railway platform on the ground granted by him or to sell refreshments on such platform without the consent of the Department.⁷

When the *usus* is left to one and the usufruct to another, the usufructuary will be entitled to whatever is left over after the usuary is satisfied, and will also be entitled to as much of the use as is essential for the due enjoyment of his usufruct.⁸

A usuary, like a usufructuary, is bound to give security for the proper treatment and due restoration of the property at the termination of the *usus*; ⁹ but is not, as a general rule, liable for any of the expenses connected with the property.¹⁰

Usus is acquired and lost in the same way as usufruct,¹¹ though it is possible to conceive an hereditary *usus* as well as an hereditary usufruct.¹² The hereditary

⁷ For another special form of *usus* see *Johannesburg Municipality v. Transvaal Cold Storage*, (1904) T. S. 728.

⁸ Voet, 7 : 8 : 1.

⁹ Voet, 7 : 9 : 1.

¹⁰ Voet, 7 : 8 : 5.

¹¹ G. 2 : 44 : 5, 10.

¹² G. 2. 44 : 7, 10.

usus is, however, generally connected with a dominant tenement, as is the case with rights of common,¹³ and will be more properly treated of under prædial servitudes.

Habitatio is the right of inhabiting or living in the house of another by one's self or with one's family;¹⁴ but it differs from *usus* in this, that the person who is entitled to it is not restricted to using it himself, but may let it to others, though he may not make it over gratuitously.¹⁵ He is, however, bound to give security,¹⁶ and his rights cease at his death.¹⁷

CHAPTER XXII.

PRÆDIAL SERVITUDES.

A PRÆDIAL servitude, as already shown, is a servitude constituted over the ground of one person for the benefit of the ground of another. From this definition certain general principles naturally flow.

In the first place, a prædial servitude must be regarded as an accession to, or an accessory of, the dominant tenement, and cannot be separated from it. It cannot, therefore, be alienated, mortgaged, or otherwise disposed of as something distinct from such tenement; nor can the owner of such tenement transfer the benefit of it to some other tenement, whether belonging to himself or to some other person;¹ but it

¹³ G. 2 : 44 : 7.

¹⁴ Voet, 7 : 8 : 6. See also *O'Reilly v. Lucke*, 4 S. C. 103.

¹⁵ Voet, 7 : 8 : 6; G. 2 : 44 : 8.

¹⁶ Voet, 7 : 9 : 1.

¹⁷ Voet, 7 : 8 : 7.

¹ *Louw v. De Villiers*, 10 S. C. 328; *Dreyer v. Ireland*, 4 Buch. 199; *Retief v. Louw*, 4 Buch. 190; Voet, 8 : 1 : 1; 1 : 8 : 20; 8 : 4 : 8, 13.

may be exercised and enjoyed by every possessor of the dominant tenement.²

The benefit of the servitude will be limited to the actual requirements of the dominant tenement,³ and it will have to be exercised in a fair and kindly manner, and with the least possible injury or inconvenience to the servient tenement.⁴ It follows that when a right of water-leading has been granted in favour of one estate, the owner cannot by virtue thereof use the water for another estate, whether belonging to himself or another.⁵ It has also been decided that where the erfholders of a village were, under the terms of the original conditions of sale of the village erven, entitled to graze their stock on the neighbouring farm of the founder of the village, this would give them the right to graze a reasonable number of stock belonging to themselves on such farm, but would not authorize the Commissioners of the Municipality to grant licences for grazing purposes to other than erfholders.⁶ It would further appear that where the owner of the dominant tenement can exercise his right of water-leading across the land of another equally conveniently and with the same benefit to his own land by means of one or other of two watercourses, the Court will allow the owner of the servient tenement to select whichever of the two will be least inconvenient to himself.⁷

A prædial servitude must be of such a nature as to offer some advantage, either present or future, to the dominant tenement, so as to increase its value or the

² Voet, 8: 1: 6.

³ *Dreyer v. Ireland*, 4 Buch. 199; Voet, 8: 4: 13; Noodt, 8: 3, par. 4.

⁴ G. 2: 35: 6.

⁵ Voet, 8: 4: 13.

⁶ *Heidelberg Municipality v. Uys*, 15 S. C. 156.

⁷ *Van der Byl v. Myburgh*, 2 S. C. 77.

enjoyment to be derived from it;⁸ and, consequently, when the utility of a servitude has permanently ceased, the servitude will itself become extinguished.⁹ This advantage also must be permanent in its nature, so as to offer a continuous possibility of enjoyment, even though the servitude may not actually be made use of even for long periods of time.¹⁰ It follows that, though there may be a servitude of water-leading with respect to *running* water which is permanent in its nature, there can be no such servitude with respect to rain- or surface-water collected in a pond, dam, or reservoir.¹¹ But an exception to this rule has been made by our law in the case of a servitude of water-drawing (*servitus aquæhaustus*), which the Roman law confined to the right of drawing living or spring water, but which has with us been extended to the right of drawing water from a rain-water tank, though it has no permanent supply.¹²

It follows also as a corollary from this rule that the dominant and servient tenements must be *neighbouring*, by which is meant not that they must necessarily be contiguous or adjoining, but that they must be situated in such a position with respect to each other that there is a possibility of the servitude affording some benefit to the dominant tenement. An urban servitude, for instance, may subsist though the two tenements are separated by intervening properties which are free from servitude; but this cannot be the case with respect to rural servitudes, which require that the intervening properties shall be subject to some servitude, though not necessarily the same as the

⁸ Voet, 8 : 4 : 15.

⁹ Voet, 8 : 5 : 4; D. 34 : 22 : 4.

¹⁰ Voet, 8 : 4 : 17.

¹¹ *Per* Watermeyer, J., in *Dreyer*

v. *Ireland*, 4 Buch. 199; Voet, 8 : 3 : 6; 8 : 4 : 17.

¹² Voet, 8 : 3 : 7; G. 2 : 35 : 13; D. 43 : 22 : 4.

servient property, in order to bring the latter into touch or communication with the dominant tenement.¹³

The grant of a servitude implies the grant of every right without which the servitude cannot be properly enjoyed. Thus the servitude *aquæhaustus* includes the right of footpath to the well or other source; the right of road includes the right to go on to the servient property to repair the road or put it in a fit state to be used as a road; and the right of water-leading across another's land includes the right of going along the watercourse on foot for the purpose of cleaning it or keeping it in repair.¹⁴

A servitude of one and the same kind may be granted to several dominant tenements belonging to different owners over one servient tenement, provided that a prior grantee of such servitude is not prejudiced by a subsequent grant.¹⁵

Prædial servitudes are indivisible in their nature, and can therefore not be acquired or exercised or lost in part only.¹⁶

Prædial servitudes are either *affirmative*, that is to say, such as oblige the owner of the servient tenement to allow the owner of the dominant tenement to exercise some of the rights of ownership upon his land, or *negative*,¹⁷ that is, such as prohibit the owner of the servient tenement from exercising some of his rights of ownership, *e.g.*, his water-rights, whether riparian or other, upon his own ground.¹⁸

Amongst negative servitudes may be mentioned, the *servitus stillicidii vel fluminis non recipiendi*, the

¹³ Voet, 8:4:19; D. 39:3:17: 2, 3, 4.

¹⁴ Voet, 8:4:16; G. 2:35:13; D. 8:1:10; 8:2:20:1; 8:3:3.

¹⁵ *Ahlbom v. Vickers*, 9 S. C. 484.

¹⁶ *Dreyer v. Letterstedt's Executors*,

5 Searle, 98; *Ebden v. Anderson*, 2 Searle, 64; Voet, 8:4:9; 8:6:1, 2, 6, 10; D. 8:3:18.

¹⁷ V. L., vol. 1, pp. 286, 293.

¹⁸ *Retief v. Louw*, 4 Buch. 174.

servitus altius non tollendi, the *servitus luminis non aperiendi*, the *servitus ne luminibus officiatur*, the *servitus non prospiciendi*, and the *servitus ne prospectui officiatur*, all of which will be treated of in their proper place; as also any other restraint upon the use of property¹⁹ or upon the ordinary rights of ownership,²⁰ or upon the alienation of property.²¹

A servitude cannot as a general rule consist in the owner of the servient tenement being obliged to do anything, though there are some exceptions, such as the *servitus oneris ferendi* and the *servitus altius tollendi*.²²

The two properties required for the constitution of a prædial servitude may be either *urban* or *rural*,²³ by the former of which terms is meant house property, whether situated in town or country, which is used for purposes of habitation or kindred purposes, together with its appurtenances,²⁴ whilst by the term rural property is meant landed property regarded as mere land, whether used for pastoral or agricultural purposes or allowed to lie waste. In fact, it is not the position of any property, whether in town or country, which makes it urban or rural, but the use to which it is put; so that there may be rural property in a town and urban property in the country.²⁵

This twofold division of property into urban and rural gives rise to a corresponding division of servitudes into *urban* and *rural* servitudes, according as the dominant tenement is urban or rural, an urban servitude being one in favour of an urban tenement as such,

¹⁹ *Van Niekerk v. Blake*, 10 S. C. 45.

²⁰ *Hattingh v. Robertson*, 21 S. C. 273.

²¹ *Meyer, Executrix of Smuts v. Meyer*, 3 Searle, 75.

²² Voet, 7: 1: 1; 8: 4: 17. See also the case of *Louw v. De Villiers*,

10 S. C. 324, in which the owner of the servient property was bound under the servitude to keep a certain reservoir full of water.

²³ Voet, 8: 1: 3; G. 2: 34: 1.

²⁴ Voet, 8: 1: 3.

²⁵ *Swarts v. Landmark*, 2 S. C. 5; Voet, 8: 1: 3. See also p. 7, above.

and a rural servitude one in favour of a rural tenement.²⁶ Hence it not unnaturally happens that the same kind of servitude may at one time be urban and at another rural, though it may be more frequently the one than the other, and is consequently classed under the heading under which it more frequently falls.²⁷

CHAPTER XXIII.

URBAN SERVITUDES.

THE following are examples of urban servitudes :—

(1) The right to build, or to lean or support one's building or part thereof, upon a neighbour's wall or building (*servitus oneris ferendi*),¹ for by the common law, as shown above, every man is bound to confine his building operations within the vertical limits of his own ground, and may not build upon another's ground or building, nor allow any portion of his building to project over a neighbour's ground.²

The peculiarity of this servitude, which distinguishes it from most other servitudes, lies in the fact that the owner of the servient tenement is not only obliged to suffer the burden, but is bound in addition to do something, that is, to keep the supporting wall or building in such a state of repair as to render it capable of rendering the necessary support;³ but he may rid himself of this obligation by giving up the supporting wall or building to the owner of the dominant tenement.⁴

²⁶ Voet, 8: 1: 4; G. 2: 34: 1; V. L., vol. 1, pp. 284, 286.

²⁷ Voet, 8: 1: 4.

¹ Voet, 8: 2: 1; G. 2: 34: 3.

² G. 2: 34: 4, 8; V. L., vol. 1, p. 287.

³ V. L., vol. 1, p. 287.

⁴ Voet, 8: 2: 1.

(2) The right of inserting a beam or beams into a neighbour's wall (*servitus tigni immittendi*), so as to rest on both the dominant and servient tenements.⁵ In this servitude, differing in that respect from the previous one, the owner of the servient tenement is not bound to keep in repair the wall in which the beam or beams are inserted, nor to restore the wall if it tumbles down.⁶

Where a beam is inserted in a neighbour's wall without any right, the latter may remove such beam of his own authority and without the necessity for any judicial intervention in the matter, inasmuch as whatever is fixed to a man's house or ground becomes his property, and may be dealt with by him as such.⁷

(3) The right to have part of one's building, such as a verandah or the eaves of one's roof, projecting over a neighbour's ground (*servitus projiciendi*), without being inserted in or leaning or being supported upon his building.⁸ In this case, as the projecting portion is not inserted in or supported on the neighbour's land, it does not become in any sense his property, but is merely a nuisance or trespass which can only be removed by judicial interference.⁹

(4) Servitudes with respect to rain-water falling on one's own or a neighbour's ground. In this connection rain-water was divided by the Roman law into two classes, namely, the rain-water dripping from the eaves of a roof (*stillicidium*), and the rain-water collected from a roof by means of guttering and discharged on to the ground by means of down-pipes or spouts

⁵ G. 2: 34: 7-9; Schorer, Note 210; Voet, 8: 2: 2; V. L., vol. 1, p. 289.

⁶ Voet, 8: 2: 2.

⁷ Voet, 8: 2: 4. See also *O'Reilly*

v. *Lucke*, 4 S. C. 103.

⁸ Voet, 8: 2: 3; V. L., vol. 1, p. 289.

⁹ Voet, 8: 2: 4.

(*flumen*). With respect to each of these there may be both an affirmative and a negative servitude, which will respectively be sought after, according as rain-water is in the circumstances of the country and climate regarded as either an enemy or friend.¹⁰ The affirmative servitudes have reference to the right (a) to allow the rain-water to drip from one's eaves on to the ground of a neighbour who is bound to receive it (*servitus stillicidii recipiendi*)¹¹ and (b) the right to discharge one's rain-water on to a neighbour's ground by means of a pipe or spout (*servitus fluminis recipiendi*).¹² With respect to both of these it must be observed that, unless anything to the contrary be provided by the grant, the water dripping or discharged on to the neighbour's ground must be clean and unpolluted.¹³ Care should also be taken not to make any alteration in the dominant building whereby the servitude will be rendered more burdensome. Hence it has been laid down that in the case of a *servitus stillicidii* the roof of the dominant tenement may be raised but not lowered; a thatched roof may not be altered into a slate or iron one, which would allow the water to run down with greater impetus; the eaves may be shortened but not lengthened, that is, the roof may be made to project less, but not more, over the servient property.¹⁴ In the case of a *servitus fluminis*, again, the owner of the dominant tenement will have no right to either raise or lower the gutter or spout, so as to be a greater burden to the servient property.¹⁵

¹⁰ Voet, 8 : 2 : 13.

¹¹ G. 2 : 34 : 10-12; V. L., vol. 1, p. 289.

¹² G. 2 : 34 : 15, 16, 24; V. L., vol. 1, p. 290.

¹³ G. 2 : 34 : 17; Schorer, Note 212; V. L., vol. 1, p. 280.

¹⁴ Voet, 8 : 2 : 13.

¹⁵ *Ibid.*; G. 2 : 34 : 26.

On the other hand, nothing may be done on the servient tenement which will interfere with one or other of these servitudes. For instance, in the case of the *servitus stillicidii* the owner of the servient property was in Holland not allowed to build in such a way as to interfere with the dripping of the rain-water, and, if he wished to build higher than the dominant building he had to leave a space of five inches clear between his building and the dominant building.¹⁶

(c) Akin to the *servitus stillicidii* and the *servitus fluminis recipiendi* is the servitude of right of sewer (*servitus cloacæ*), that is, the right to have a sewer discharging itself into or running across another's ground.¹⁷

The negative servitudes with respect to rain-water are servitudes which deprive the owner of the servient tenement of his common-law right of appropriating the rain-water which falls within the vertical limits of his ground, whether upon the surface of his ground or upon the roofs of the buildings thereon, to his own use, and compel him to allow such water to discharge itself on to his neighbour's ground either (d) by way of drippings from the eaves (*servitus stillicidii non recipiendi*) or (e) by means of a down-pipe and spout (*servitus fluminis non recipiendi*).¹⁸

(5) There are two species of servitude with respect to the height to which a landowner is allowed to build upon his own ground, the one negative and the other affirmative or positive in a more than ordinary sense, namely :

(a) The *servitus altius non tollendi*, which prevents

¹⁶ Voet, 8: 2: 13; G. 2: 34: 12; p. 290.
V. L., vol. 1, p. 289.

¹⁸ G. 2: 34: 13, 14; V. L., vol. 1,

¹⁷ Voet, 8: 2: 14; V. L., vol. 1, p. 290.

the owner of the servient tenement from raising his buildings higher or from building higher than a certain fixed height.¹⁹

(b) The *servitus altius tollendi*, which is not, as might at the first glance be imagined, a state of release from the *servitus altius non tollendi*,²⁰ but the right of building a wall on a neighbour's ground or of raising one already there higher, in order to have the benefit of the light reflected therefrom or for purposes of shelter,²¹ or even the right of compelling the neighbour to keep a wall standing or to raise it higher on his own ground with the same objects in view, in which respect this servitude, like that *oneris ferendi*, is an exception to the general rule that the owner of the servient property cannot be bound to do anything.²²

(6) Servitudes as to light or windows are the following:

(a) Window right, that is, the right to have a window in a neighbour's wall or a common wall, or in one's own wall, indeed, but opening by way of casement and hanging over another's ground (*servitus luminis aperiendi sive immittendi*),²³ which last will include the *servitus luminis non officiendi*.²⁴

(b) The *servitus luminis non aperiendi*, which is a negative servitude depriving a landowner of the right of having a window in his own wall.²⁵

(c) The *servitus luminibus non officiendi* or *ne luminibus officiatur*, which is the right to demand that a neighbour shall do nothing on his own ground,

¹⁹ Voet, 8: 2: 8; G. 2: 34: 18,
19; V. L., vol. 1, p. 291.

²⁰ Voet, 8: 2: 5.

²¹ Voet, 8: 2: 6.

²² Voet, 8: 2: 7.

²³ Voet, 8: 2: 9, 16; G. 2: 34: 5,
24.

²⁴ G. 2: 34: 22, 23; V. L., vol. 1,
p. 291.

²⁵ Voet, 8: 2: 10.

whether by building, planting trees, or otherwise, whereby the light or the windows on one's own property are obstructed or interfered with, and which may therefore often include the *servitus altius non tollendi* or the *servitus altius tollendi*.²⁶ Where this servitude has been constituted in general terms, *e.g.*, "that lights shall not be obstructed," Voet holds that it applies in favour of all lights or windows, as well those existing at the time of the granting of the servitude as those which may come into existence afterwards.²⁷ But where the terms of the grant were, "The proprietors of this (the servient) lot shall by no means whatever obstruct *the windows of the store, lot No. 3*, looking out into the passage belonging to lot No. 1, nor prevent free access of light into the same," the Supreme Court decided that these terms were not general, but specific, and referred only to the windows existing in the store at the time of the grant, and did not apply to windows inserted in the store later on, which might therefore freely be obstructed.²⁸ It would also appear that, where any obstruction to lights is anticipated from a building which is in course of erection by a neighbour, timely notice should be given to him, and he should not be allowed first to finish the building before a remedy is applied for.²⁹

(7) Similar servitudes to those with reference to lights obtain also with respect to prospect or view, namely:

(a) The *servitus non prospiciendi*, which is a negative servitude preventing a man from looking into his neighbour's grounds.³⁰

²⁶ Voet, 8: 2: 11; G. 2: 34: 20,
21; V. L., vol. 1, p. 291.

²⁷ Voet, 8: 2: 11.

²⁸ *St. Leger v. Town Council of Cape Town*, 12 S. C. 249.

²⁹ Per Wylde, C.J., in *Pike v. Hamilton, Ross & Co.*, 2 Searle, 196.

³⁰ Voet, 8: 2: 12; G. 2: 34: 27; V. L., vol. 1, p. 291.

(b) The *servitus prospectus* or *ne prospectui officiatur*, which, when granted in general terms, is the right to forbid a neighbour from obstructing the view or prospect from one's property, whether by building or by planting trees on his own ground.³¹ This servitude, like all servitudes, will have to be strictly interpreted, and, consequently, where the grant of a servitude provided that no buildings should be erected on the servient tenement whereby the view from the house or garden of the dominant tenement would be obstructed, it was held that this servitude did not prevent the obstruction of the view by means of trees.³²

Before leaving the subject of urban servitudes, it will not be inappropriate to consider a matter which is a sort of compound of full ownership and several urban servitudes, namely, that of common or party wall, which is a wall standing or presumed to stand upon the common boundary of two properties, half on the one and half on the other.³³ We say a compound of ownership and servitudes, because each of the owners of the adjoining properties, whilst he is owner of that half of the thickness of the wall which stands on his ground, has no right of ownership in that portion of the wall which stands on his neighbour's ground, though he has the right of a co-owner of the wall to this extent, that he is entitled to the maintenance of such latter portion, and, if the wall is destroyed, he may rebuild it at his own expense.³⁴ Each owner is also subject, as regards his half of the wall, to several servitudes in favour of the other half, by reason of which his right to deal with his own half is limited. To ascertain what these servitudes are, we must consider

³¹ Voet, 8: 2: 12; G. 2: 34: 20,
21; V. L., vol. 1, p. 291.

³² *Myburgh v. Jamison*, 4 Searle, 8.

³³ Voet, 8: 2: 15.

³⁴ *Wiener v. Van der Byl*, 21 S. C.

the nature and objects of a wall between two properties. The first object of such a wall, then, is to act as a barrier to prevent reciprocal trespass across the common boundary, and the second to serve as a screen from reciprocal observation and to a certain extent, no doubt, against sound. In order to maintain this barrier and screen, it is essential that each half of the wall shall, so far as is necessary for its stability, act as a support to the other half. The first servitude, therefore, which subsists between the two properties, in order to effect this object, is a servitude of mutual support between the two halves of the wall, and everything which is likely to endanger or to be injurious to such mutual support is therefore prohibited;³⁵ but, so long as the stability of the wall is not affected, each owner is entitled to treat his half of the wall as any other part of his private property. Thus, if it pleases him, he may pare away his half of the wall to any extent he likes, provided the permanent stability of the wall is not thereby endangered or his neighbour's half thereof otherwise injured. With the same proviso, he may let beams or rafters into his half of the wall or place a gutter or water-pipe thereon,³⁶ and, where such is possible, may even place a gutter upon the wall to serve both properties, in which case such gutter will become common property.³⁷ It is unnecessary to add that one owner is not entitled, without the consent of the other, to pull down the common wall, unless such demolition becomes absolutely necessary for the protection of both properties.³⁸

³⁵ *Pike v. Hamilton, Ross & Co.*,
2 Searle, 191; Voet, 8: 2: 16; G. 2:
34: 5; Schorer, Notes 207, 209;
V. L., vol. 1, pp. 288, 289.

³⁶ Voet, 8: 2: 16.

³⁷ G. 2: 34: 25.

³⁸ *Franck v. Sachs, Ginsberg,*
Hoffman, and the Cape Town Town
Council, 20 S. C. 662.

He may also build on his half of the common wall up to the middle line, provided his half of the wall is sufficiently strong to bear the additional burden, each half of the wall being only bound to support the other half, and not also any additional weight which one of the neighbours may be pleased to put upon it.³⁹ When the half of the wall is not sufficient by itself to support the additional burden, it can only be built upon with the consent of the owner of the other half;⁴⁰ and if one of the owners builds beyond the middle line, he may be compelled to remove the encroachment;⁴¹ but if the other owner stands by and allows the building to be completed without objecting, he will not be entitled to insist upon such removal, but will have to be satisfied with compensation in damages.⁴²

In the same way everything which frustrates the objects of the wall, namely, to act as a barrier and a screen against sight or sound, is also forbidden. Thus it is not allowed to make an aperture or place a window in a common wall,⁴³ nor may one of the neighbours, without the consent of the other, pull down the wall and place a fence or hedge in its stead, because the latter, however effective as a barrier, may be of no use as a screen from sight or sound; but he may, without such consent, and at his own expense, erect a wall in place of a fence or hedge,⁴⁴ provided he does not thereby encroach further upon the neighbour's ground.

It must be observed, in conclusion, that whenever one or other of two neighbours builds a wall on

³⁹ Voet, 8: 2: 17; G. 2: 34: 4; V. L., vol. 1, p. 287.

⁴⁰ V. L., vol. 1, p. 287.

⁴¹ *Pike v. Hamilton, Ross & Co.*, 2 Searle, 191; G. 2: 34: 4; Schorer, Note 207.

⁴² Voet, 8: 2: 17.

⁴³ *Pike v. Hamilton, Ross & Co.*, 2 Searle, 191; *Lasker v. Crapper*, 1 Roscoe, 303; Voet, 8: 2: 16; G. 2: 34: 5; V. L., vol. 1, p. 288.

⁴⁴ Voet, 8: 2: 16; G. 2: 34: 5.

the common boundary line, that is, partly on one and partly on the other of the adjoining properties, it becomes what is called a common or party wall, and subject to the rules above laid down.⁴⁶ It must further be noted that, whenever it cannot be clearly proved that a wall which divides two properties is situated wholly on the one or on the other of the two, it will be presumed to be a common wall.⁴⁶ The same rule applies to any fence, ditch, passage, or other vacant space between two properties;⁴⁷ and it may be stated generally with respect to any common fence, ditch, or passage that similar rules to those laid down above apply also *mutatis mutandis* to them. One of the neighbours, for instance, is not entitled to do anything to a common passage, whereby the purpose for which it was originally intended is interfered with, and may consequently not claim a division of the common passage between the two adjoining properties.⁴⁸

A common wall will have to be kept in repair at the common expense, but either neighbour may release himself from such expense by abandoning his share of the wall to the other.⁴⁹

CHAPTER XXIV.

RURAL SERVITUDES.

THE following are examples of rural servitudes :—

The right to go across the land of another, of which there are four kinds :

⁴⁶ G. 2: 34: 5; V. L., vol. 1, p. 288.

⁴⁶ *Pike v. Hamilton, Ross & Co.*, 2 Searle, 191; Voet, 8: 2: 15;

Schorer, Note 208.

⁴⁷ *Ibid.*; G. 3: 28: 19.

⁴⁸ Voet, 8: 2: 18.

⁴⁹ G. 2: 34: 6.

(a) The right of footpath (*servitus itineris*) or of going across another's land on foot.¹

(b) The right of bridle-road, which is the right of going across the land of another on horseback.²

(c) The right of *trekpath* or cattle-road (*servitus actus*), that is, the right of driving cattle across another's land, which may or may not include the right of driving a wagon across it, according as the width of the track will or will not allow of it.³ The ordinary width of a trekpath or cattle-road in this Colony is not less than eight feet, and a servitude of that kind will therefore allow of the road being used for driving a wagon, unless the width has been expressly limited or the use of the road with wagons expressly forbidden.⁴ The width of the trekpath, if unenclosed, will depend upon the number of cattle for which it is required, and, consequently, where the road was needed to drive some three or four hundred head of cattle, the Court allowed a width of one hundred and fifty yards, and intimated that for a larger number of cattle even a greater width might be allowed.⁵ Where a fence crosses a trekpath, a swing-gate will, under the Fencing Act, have to be placed across the road of a width of not less than fifteen feet; but this width may be varied by the Divisional Council of the division in which the gate is situate.⁶

(d) The right of way proper (*servitus viæ*), that is, the right of passing over another's land with vehicles, or on horseback, or on foot, and also of driving cattle across it.⁷

¹ Voet, 8: 3: 1; G. 2: 35: 2; V. L., vol. 1, p. 294.

² Voet, 8: 3: 1; G. 2: 35: 3.

³ Voet, 8: 3: 2; G. 2: 35: 4; V. L., vol. 1, p. 294.

⁴ *Breda's Executor and another v. Mills*, 2 S. C. 189; Voet, 8: 3: 2.

⁵ *Laubscher v. Reeve and others*, 1 Roscoe, 408.

⁶ Act, 37, 1896.

⁷ *Breda's Executor and another v. Mills*, 2 S. C. 195; Voet, 8: 3: 3; G. 2: 35: 5; V. L., vol. 1, p. 284.

A right of way along the same road may be granted to several dominant tenements, and the grant of such a servitude to one will not prevent the subsequent grant of the same servitude to another, unless the second grant interferes with the proper enjoyment of the first.⁸ The width of a road must be sufficient for use both with vehicles and cattle, and it has been decided that where a person had purchased a piece of land with a right of way over some other land, eight feet was the least width that he could be expected to be satisfied with.⁹ Where several persons were entitled to use the same road, the width was in Holland fixed at twelve feet, but at any rate it will have to be of sufficient width to allow of vehicles passing each other.¹⁰

With respect to all the above rights of passage over another man's land, namely, right of footpath, bridle-road, cattle-track, and right of way, it may be observed generally that the more comprehensive always includes the less comprehensive, unless there be an express reservation to the contrary.¹¹ Thus a bridle-road includes a footpath,¹² a right of cattle-road includes the right of passage on horseback or on foot,¹³ and the right of way or road includes all the other three.¹⁴ Like all other servitudes, they require to be exercised in a kindly manner, and with the least possible inconvenience to the servient tenement;¹⁵ but they may be made use of, not only by the owner of the dominant tenement, but by any one who has a legal right to be

⁸ *Ahlbom v. Vickers*, 9 S. C. 484.

⁹ *Pieterse v. Estate of Gabrielse*, 21 S. C. 202.

¹⁰ Voet, 8: 3: 3; V. L., vol. 1, p. 296.

¹¹ Voet, 8: 3: 2, 3; V. L. vol. 1,

p. 294.

¹² G. 2: 35: 3.

¹³ Voet, 8: 3: 2; G. 2: 35: 4.

¹⁴ Voet, 8: 3: 3; G. 2: 35: 5.

¹⁵ G. 2: 35: 6; V. L., vol. 1, p. 294.

upon the dominant tenement, such as servants, guests, visitors, labourers, etc.¹⁶

Where a right of way or passage is granted in general terms without specifying any particular route, the owner of the dominant tenement may fix upon any route he pleases, but when he has once made his selection he will have to stick to it, and cannot afterwards alter it; and when there are several owners of the dominant tenement, they will be obliged to join in making the selection of one route for the common use.¹⁷ The right of selection will have to be exercised in a fair and reasonable manner, and will not allow the person entitled to it to fix on a route which leads through the house or across the homestead or cultivated lands of the servient tenement, when another route would be equally convenient to him and cause less inconvenience to the owner of the servient tenement.¹⁸ Where the parties cannot agree as to a route, it may have to be settled by arbitration¹⁹ or by the Court. Where the owner of the servient tenement, after a selection has been made, finds later on that another route would be more convenient to him, he may alter the route, provided this can be done without injury or prejudice to the owner of the dominant tenement.²⁰

Any person who is entitled to a right of way has also the right of repairing the road in so far as is necessary for its proper use.²¹

In addition to the above rights of passage, which have their origin, like all other servitudes, in express or implied grant, we have to consider another kind of right of way which falls under the class of servitudes

¹⁶ Voet, 8: 3: 1.

¹⁷ Voet, 8: 3: 8; V. L., vol. 1, p. 294.

¹⁸ Voet, 8: 3: 8; *Allen v. Colonial*

Government, 24 S. C. 7.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Voet, 8: 4: 16.

of necessity, to which allusion has already been made above,²² namely, necessary way or way of necessity. It is based on the right which every owner of land has to communication with the world at large outside his ground, and, with this object in view (whenever no definite path or road has been allotted to him by way of grant or acquired for his land by prescription), to claim some means of access to the public roads of the country, without which his land would be useless to him.²³ This means of access is spoken of as a way of necessity or necessary way, which is the right of a landowner, in the absence of any express servitude, to cross over all properties intervening between his ground and the nearest public road.²⁴ Where a piece of land which abuts on a public road is divided into two portions, one of which is not in contact with the public road, without anything being said as to a right of passage, the portion so separated from the road will naturally have to claim its way of necessity over the other portion, and not over another neighbour's ground.²⁵

The right to a way of necessity is indefinite in its character and not limited to any particular route, and consequently, as long as a convenient route of communication is kept open whenever it is required, the person who is entitled to it will have no reason to complain. There is nothing, therefore, to prevent the owner of the servient tenement from fencing or otherwise enclosing his land, provided a means of access is left open,²⁶ nor is he prevented from even breaking up, ploughing over, or building on a route once selected

²² See p. 93, above.

²³ *Kimberley Mining Board v. Stanford*, 1 Buch. App. C. 129; G. 2: 35: 7.

²⁴ Voet, 8: 3: 4; G. 2: 35: 8, 11; V. L., vol. 1, p. 295.

²⁵ V. L., vol. 1, p. 297.

²⁶ V. L., vol. 1, p. 296.

by the owner of the dominant tenement, even though he may have agreed to it, unless he has granted a definite right of road along that route, provided he leaves another reasonably convenient road to the public road open for use.²⁷ The right, however, is limited to the absolute necessities of the case, and must be exercised with the least inconvenience and damage to the owner of the servient property;²⁸ but by the term "absolute necessity" is not meant that there can be no road of necessity over a neighbour's land, except where such road is the only approach to a public road, for cases may arise in which the alternative route may be so difficult and inconvenient as to be practically impossible, in which case the Court may be justified in affording relief.²⁹ The owner of the dominant tenement may, however, claim to have this indefinite right of way converted into an express definite servitude or right of way, either by agreement between the parties or in an action at law, subject, however, to reasonable compensation to the owner of the servient tenement. When once an express servitude has been granted, the right to the road of necessity ceases.

The present will, perhaps, not be an inappropriate place to consider a subject which would otherwise properly fall under the heading of the mode of acquiring servitudes or of the interpretation of servitudes. We refer to the effect of the exhibition of a *general plan* at a public sale of land in lots to confer rights of way upon the purchasers of the lots at such sale. The

²⁷ *Peacock v. Hodges*, 6 Buch. 69; Voet, 8: 3: 4; G. 2: 35: 12; Schorer, Note 216.

²⁸ *London and South African Exploration Co. v. Bultfontein Mining*

Co., 8 S. C. 60; *Peacock v. Hodges*, 6 Buch. 69; G. 2: 35: 11; Schorer, Note 216; Voet, 8: 3: 4.

²⁹ *Van Schalkwyk v. Du Plessis and others*, 17 S. C. 454.

question may arise either between two or more purchasers of the lots or between such purchasers and the owner of the remaining extent of the land left unsold. Several cases have been decided upon this subject, and the following points may be regarded as established.

The mere fact that a particular road appears upon the general plan is not conclusive as to the right of every purchaser or owner of a lot to use it,³⁰ nor will the registration or deposit of the general plan in the office of the Registrar of Deeds affect the rights of the purchasers or of the owner of the remaining extent.³¹ Where roads are laid down on a general plan, the owner of each lot will, in the absence of any express servitude in his favour, be entitled to use only such of the roads laid down on the plan as are reasonably necessary for convenient access to and egress from a public road,"³² but not to the use of any road not adjoining his lot nor serving as a means of communication between it and a public road.³³ He will not, however, be limited to communication with one public road, but is entitled to access to all public roads with which the roads leading from his lot communicate according to the plan, and for this purpose may use all the roads so communicating, whether he requires them as a matter of necessity or as a matter of mere convenience.³⁴

Where a general plan exhibited at a sale shows an "open space for municipal purposes" it will constitute a contract between the purchasers and seller that the

³⁰ *Ohlsson's Cape Breweries v. Whitehead*, 9 S. C. 84.

³¹ *Hiddingh v. Topps*, 4 Searle, 107.

³² *Ross and another v. Hite's Executor*, 16 S. C. 139; *Ohlsson's Cape*

Breweries v. Whitehead, 9 S. C. 84.

³³ *Ohlsson's Cape Breweries v. Whitehead*, 9 S. C. 84; *Porter v. Philip*, 6 Buch. 192.

³⁴ *Hiddingh v. Topps*, 4 Searle, 107; *Porter v. Philip*, 6 Buch. 192.

space so indicated will be reserved as an open space for municipal purposes.³⁵

If a question arises as to the ownership of the soil of any road laid down upon the general plan, it has been decided that where the seller has not reserved to himself the *dominium* in the roads, he must be taken to have intended to transfer such *dominium* to the owners of the lots on either side of such roads, subject to any rights of way that the owners of the other lots may have along it; and if all the lots on both sides of the road fall into the hands of one person, he will be the owner of the whole of the road, and if none of the owners of the other lots are entitled to a right of way along it, he may close it up as being his private property.³⁶

On the other hand, where the original seller had, as appeared from the transfers of the lots, merely sold the lots up to the roads and had retained the ownership of the roads, a person who becomes the owner of all the lots on both sides of a particular road, over which there is not a right of way in favour of others, will not be entitled to close such road as against the owner of the remaining extent, who will be the owner of the soil of the road.³⁷

The present may also be an appropriate place to consider the subject of public roads, though all of them do not necessarily fall under the heading of servitudes. Public roads are roads the use whereof is common to the public at large.³⁸ They are either proclaimed or unproclaimed roads.

³⁵ *Estate Gardiner v. Town Council, Port Elizabeth*, 19 S. C. 507.

³⁶ *Porter v. Philip*, 6 Buch. 192; *Ohlsson's Cape Breweries v. Whitehead*, 9 S. C. 87, 88.

³⁷ *Executors of Hofmeyr v. De*

Waal, 1 S. C. 424; *Hiddingsh v. Topps*, 4 Searle, 107. See also *Bank of Africa v. Daniel*, 10 S. C. 120.

³⁸ V. L., vol. 1, p. 295; Voet, 43 : 7 : 1; 43 : 8 : 1.

Proclaimed public roads are such as have been proclaimed as such by the proper legal authority,³⁹ and are either main roads or divisional roads.

Main roads are roads constructed by the Government, but which after completion have been handed over to the Divisional Councils of the divisions through which they pass, for the purpose of being maintained by these public bodies.⁴⁰ Divisional roads are roads which, not being main roads, have been constructed, or at any rate have to be maintained, by the Divisional Councils.⁴¹

All main and divisional roads, before they can become such, require to be proclaimed by the Governor at the request of the Divisional Council, and may also in the same way be deproclaimed.⁴² Proclaimed roads differ from unproclaimed roads, and also from private rights of way, inasmuch as the ownership in the soil of proclaimed roads is vested in the Divisional Councils,⁴³ whereas in the case of unproclaimed public roads and private rights of way, the ownership in the roads remains in the owner of the ground over which they pass.⁴⁴ This fact at once takes proclaimed roads out of the class of servitudes, and they are only differentiated from other ordinary property by the circumstance that the public ownership in them is merely of a temporary character, for as soon as they are deproclaimed they

³⁹ Voet, 47: 3: 1.

⁴⁰ Act 40, 1889, secs. 141, 149, 150.

⁴¹ Act 40, 1889, sec. 141.

⁴² Act 40, 1889, secs. 149, 152; *Snyman v. Schenke*, 8 E. D. C. 68.

⁴³ Act 40, 1889, sec. 142; Act 9, 1858, sec. 58; *Landmark v. Van der Walt*, 3 S. C. 304; *London and*

South African Exploration Co. v. Divisional Council of Kimberley and Mylchreest, 5 S. C. 143; *The Mission Trading Co. v. Hessel*, 9 Buch. 74. But see *Wallace v. Randall*, 3 E. D. C. 87; *Kock v. Divisional Council of the Cape*, 19 S. C. 441.

⁴⁴ Voet, 43: 7: 1; G. 2: 35: 9: 10.

fall back into the ownership of the person over whose lands they pass.

Of Municipal streets and roads we do not treat here at all, because they fall absolutely within the category of ordinary property or dominium, except that the use of them is open to the public, subject to the Municipal regulations.

Before the enactment of Act 27, 1884, no particular width was laid down or fixed either by statute or custom for main or divisional roads,⁴⁵ though a width had been defined for public roads by the laws and customs of Holland;⁴⁶ but by that statute it was provided that the Divisional Councils should determine the width of all public roads, as also the width of all trekipaths along such public roads,⁴⁷ and the same is now provided by sections 156 and 157 of Act 40, 1889.

Voet classes all public roads, which are here styled unproclaimed roads, under the heading of *viæ vicinales*.⁴⁸ A *via vicinalis*, according to the Digest,⁴⁹ was one which was made up of contributions of the ground of private landowners and which had existed from time immemorial. There was this difference, however, between it and other public roads, that the latter had their exit or terminus on the seashore, or in cities, or on the banks of public rivers, or in other public roads, whereas a *via vicinalis* had its one end on a public road and the other end gradually disappearing and losing itself without any exit. In other words, a *via vicinalis* was a road leading from a proclaimed public road to a number of neighbouring farms, and used by the owners of such farms in

⁴⁵ *Berry v. The Divisional Council of Port Elizabeth*, 1 E. D. C. 241.

⁴⁶ Voet, 43 : 7 : 2.

⁴⁷ Act 27, 1884, secs. 2, 3.

⁴⁸ Voet, 43 : 7 : 1.

⁴⁹ D. 43 : 7 : 3. See also *Allen v. Colonial Government*, 24 S. C. 5.

common under an express or implied agreement to that effect.

The term *via vicinalis* was not quite felicitously, by Grotius and the other Roman-Dutch text-writers, translated by the Dutch word *buurweg*, that is, *neighbour's road*, whereas a more correct interpretation would be *farm or country roads*, that is, roads leading to the country or to farms or country houses (*in vicos*),⁵⁰ and, as a matter of fact, the term was applied to all unproclaimed public roads. The difference between these and proclaimed roads is that in the latter the rights of the public are a matter of ownership exercised through the Divisional Councils, as already pointed out, whereas in the former they are a matter of servitude exercised by each member of the public in his own right.⁵¹

Similar rules apply to unproclaimed public roads as to private servitudes of right of way. Thus the persons who are entitled to the use of the roads must use them in a kindly manner as regards the owners of the land over which they pass. They may not without his permission diverge from such a road and make a new track in a different direction, and if, owing to some natural catastrophe, the road becomes impassable, and it is impossible to repair it without unreasonable expense, they will be entitled to make a diversion, but not to any larger extent than is absolutely necessary.⁵²

Unproclaimed public roads are acquired by the public either by express grant *coram lege loci* or by immemorial usage.

⁵⁰ Voet, 43: 7: 1; 8: 3: 5; V. L., *Colonial Government*, 24 S. C. 9.
vol. 1, p. 296.

⁵¹ Voet, 43: 7: 1; *Allen v. 279.*
⁵² *Assman v. Rautman*, 12 S. C.

Where public roads are due to registered grant, it may be pointed out that the grant may be either general or specific. A grant may be said to be general where, as is the case with all grants of Crown land, ground is granted or transferred with the condition that all roads and thoroughfares shall remain free and uninterrupted, or something to a similar effect. Such a condition would apply to all roads and rights of way, public as well as private, which had been acquired and become valid as against the Government or grantor before the issue of the grant.⁵³ The existence and validity of such rights of way will have to be established by evidence *aliunde* of the grant, though evidence of their existence may sometimes be found upon the diagram attached to the grant.⁵⁴

Specific grants of public roads do not differ in any respect from specific grants of private rights of way, except that they confer a right upon the public generally and not merely upon the owner of a particular property, and need not, therefore, be here separately considered.

By the term "immemorial usage," in connection with the acquisition of a public right of way, is meant the user of any non-proclaimed road for a period extending beyond the memory of man. "It bears," said De Villiers, C.J., in the case of *Ludolph and others v. Wegner and others*,⁵⁵ "a close analogy to prescription, but it is not the same thing. An immemorial custom or usage does not depend upon the acts of any particular individuals, whereas a

⁵³ *Ellman v. Werth*, 16 S. C. 173.

⁵⁵ *Ludolph and others v. Wegner*

⁵⁴ *Niekerk v. Wakefield*, 20 S. C. 530.

and others, 6 S. C. 198.

servitude by prescription can only be acquired upon proof of user by the person claiming the right, and by those from whom his title is derived." By such immemorial usage it was laid down in the case just quoted that a road, which was in the first instance in the position merely of a reciprocal servitude between the owners of a number of properties situated in the same neighbourhood, might be converted into a public right of way in favour of the public; and it was held that, where such a user is proved to have continued for thirty years and upwards, the Court will, in the absence of any evidence as to when and how it actually commenced, be justified in holding that it had existed from time immemorial.⁵⁶

Another method of acquiring the right to a public road was first recognized in a suit decided in the High Court of Griqualand West, namely, by the process of dedication to the public.⁵⁷ In that case the Court decided that where there had been an open and public user for a number of years, but not amounting to the period of prescription, by the inhabitants of Kimberley of a certain road, which road had been repaired from time to time by the Council with the apparent consent and acquiescence of the owners of the ground, this amounted to a dedication to the public. The same point also cropped up in a case in the Supreme Court, but not upon exactly the same lines,⁵⁸ in which it was decided that the mere fact that a seller and purchaser had agreed to reserve a certain road for

⁵⁶ *Ludolph and others v. Wegner and others*, 6 S. C. 198, 199. See also *Peacock v. Hodges*, 6 Buch. 70; *London and South African Exploration Co. v. Kimberley Town Council*, 1 H. C. 159; *Assman v. Rautman*, 12 S. C. 279.

⁵⁷ *London and South African Exploration Co. v. Kimberley Town Council*, 1 H. C. 136.

⁵⁸ *Fleming v. The Liesbeck Municipality*, 3 S. C. 268. Conf. G. 3: 1: 48.

the public, which agreement was embodied in the latter's transfer and marked in the diagram attached to the same, did not confer a right of road upon the public, until, and except in so far as, there had been an actual user of the road by the public.

The principle of dedication to the public seems also to have been recognized to some extent in an early case with regard to the right of common pasturage in favour of a village, though these matters were simplified by the fact that the right claimed was further established by immemorial usage.⁵⁹

Reverting to servitudes proper, we come to pastoral and agricultural servitudes, namely, such as are of benefit mainly for pastoral and agricultural purposes. The first of these is the servitude or right of grazing the stock belonging to the owner of one farm upon the farm of another (*servitus pascui sive pecoris pascendi*).⁶⁰ The right of grazing is in such a case limited to the cattle or stock *bonâ fide* belonging to the owner of the dominant tenement, and will not entitle him to graze the cattle of strangers upon the servient tenement.⁶¹ On the other hand, the owner of the servient tenement will not be entitled to do anything upon his property which will interfere with the grazing rights of the dominant tenement, though, so long as this is not done, there is nothing to prevent his grazing his own cattle on the same ground.⁶²

The servitude of grazing is often reserved by the founder of a town or village in favour of the erf-holders in such town or village, in which case the right reserved may be either a right of grazing stock

⁵⁹ *Municipality of Swellendam v. Surveyor-General*, 3 Menzies, 578.

⁶⁰ Voet, 8: 3: 10.

⁶¹ *Heidelberg Municipality v. Uys*, 15 S. C. 156; Voet, 8: 3: 10.

⁶² Voet, 8: 3: 10.

over a certain definite piece of ground granted to the town or village as commonage or a general right of grazing upon the farm, the ownership of which is retained by the founder.⁶³ Where such a servitude was in the terms "that the erfholders were to have the right in perpetuity to graze their cattle upon a defined portion of the founder's farm, and that this right of grazing was to remain to them without any hindrance of any kind," the Court held that the erfholders were entitled to a reasonable use of the commonage, and that the owner of the servient tenement was not entitled to do anything which would interfere with the reasonable wants of the erfholders. If there was sufficient pasturage on the commonage to satisfy the reasonable requirements and yet leave something to spare, there was nothing to prevent the owner of the servient tenement from putting his own cattle on the commonage to take advantage of the residue; but he was not entitled to do so if the pasturage was only just sufficient for the erfholders.⁶⁴ On the other hand, it was held that the servitude was only in favour of the cattle belonging to the erfholders, and that the Commissioners of the Municipality were therefore not entitled to authorize other than erfholders to graze cattle on the commonage.⁶⁵

In the same way as a public right of way may be acquired by immemorial usage and by dedication to the public, so also, it would appear, can a public right of pasturage or common be so acquired in favour of the inhabitants of a town or village. Thus in the

⁶³ *Villagers of Bredasdorp v. Churchwardens of Bredasdorp*, 3 Buch. 64.

⁶⁴ *Heidelberg Municipality v. Uys*, 15 S. C. 156. See also *Adendorp Municipality v. Kingwill*, 22 S. C.

193; *Aberdeen Municipality v. Aberdeen Dutch Reformed Church*, 22 S. C. 474.

⁶⁵ *Heidelberg Municipality v. Uys*, 15 S. C. 156.

case of the *Municipality of Swellendam v. Surveyor-General*,⁶⁶ it was held that such a right of pasturage had been acquired as well by immemorial usage as by dedication to, and subsequent user by, the public or inhabitants of a village.

Similar rights to the above may also be reserved for the public with respect to firewood or the quarrying of stone.⁶⁷ In the case of *Meintjes v. Oberholzer and others*,⁶⁸ for instance, the original grant of a farm by the Government contained the following condition: "That the fuel on this land shall remain at the disposal of the public." This was construed by the Court to amount merely to a servitude in favour of the public, the ownership in the fuel being in the owner of the farm, and to entitle every member of the public, whether the inhabitant of a neighbouring town or village or a casual traveller, to take firewood for his own *bonâ fide* use from the servient farm, but not for the purpose of sale to others. For the proper enjoyment of this right he was entitled to drive on to the farm with a wagon and horses, but could not drive in all directions over the farm, the owner being entitled to define the tracks which, while enabling the public to have the full enjoyment of their rights, limited them to doing so with the least detriment to himself. The public were also entitled to outspan on the farm for purposes of rest, but not to allow their draught animals to graze thereon; and this right of outspanning might also be limited by the owner to certain special spots. Similar principles were applied in the case of *Van Niekerk v. Wimble*,⁶⁹ in which

⁶⁶ *Municipality of Swellendam v. Surveyor-General*, 3 Menzies, 578.

⁶⁷ *Lind v. Gibbs & Cooper*, 12 S. C. 287.

⁶⁸ *Meintjes v. Oberholzer and others*,

3 Searle, 265. See also *Adendorp Municipality v. Kingwill*, 22 S. C. 193.

⁶⁹ *Van Niekerk v. Wimble*, 8 Buch. 190. See also Voet, 7: 8: 2 in fine.

it was further laid down that, where a village had been established on such a servient farm, and the erven sold upon certain conditions which limited the right to the firewood, any purchaser of the erven would be bound by such limitation, and would be prejudiced in his public right to that extent.

In a similar way, where one of the duly registered conditions of sale, upon which lots of land laid out for a township were sold, was that the purchasers should not be entitled to dig gravel, quarry stone, erect brick-kilns, or make and burn bricks upon the commonage or village lands without the consent of the owners, it was held that the Commissioners of a Municipality subsequently established were not entitled to make regulations authorizing them to grant permits for the above purposes without the leave of the owners of the remaining extent of the original farm.⁷⁰

In the matter of public outspans, again, it has been decided that where a grant of a farm contained a clause providing that "the outspan place laid down in the diagram shall remain free and uninterrupted," this merely amounted to a servitude of outspan in favour of the travelling public, and did not vest the ownership of the outspan in the Government or the Divisional Council. It was further held that the owner of the servient tenement was not prevented from grazing his own stock or stock which was in his lawful custody or possession on the outspan, provided he always left sufficient pasturage for the use of the general public.⁷¹ The same was held in a case heard in the High Court of Griqualand West,⁷² in which it

⁷⁰ *Tarkastad Dutch Reformed Church v. Tarkastad Municipality*, 15 S. C. 371.

⁷¹ *Divisional Council of Albany v.*

Lombard and others, 10 E. D. C. 1.

⁷² *Divisional Council of Kimberley v. Executrix Testamentary of Sheasby*, 6 H. C. 167.

was further decided that, where the original grant of a farm was "subject to a public outspanning and grazing for the cattle of travellers," though this in the first instance gave the public an indefinite right of grazing over the whole farm, the owner of the farm was entitled to have this right defined and limited to a particular area in such a manner as might be consistent not only with his own right, but also with those of the travelling public; and this seems to be in agreement with the principles laid down above in the case of *Meintjes v. Oberholzer*.⁷³ Where an outspan has by mutual agreement been defined in the manner just suggested, the Divisional Council would be entitled to have it registered in the office of the Registrar of Deeds.

The regulation and control of public outspans in the public interest have been from time to time provided for by statute.⁷⁴

One of the most important kinds of rural servitude is that of water-leading (*aquæductus sive servitus aquæ ducendæ*), which is of two sorts, consisting either in the mere right of passage for water or in the right of a landowner to appropriate to his own use running water, to which he would, without such servitude, not have been entitled under the common law, or to use it in a different manner from what he would have been entitled to under the common law, or in a combination of the two. It must be observed, however, that such a servitude can only apply to running or living water, for there can be no servitude of water-leading with respect to rain- or surface-water collected in a dam,

⁷³ *Meintjes v. Oberholzer and others*, 3 Searle, 265.

⁷⁴ Ord. 16, 1847, sec. 27; Act 29, 1889, sec. 5; Act 15, 1891, sec. 2,

sub-sec. d; Act 15, 1892, sec. 50; Act 11, 1893, secs. 3-5; Act 41, 1902; Act 13, 1906; *Arendt v. Van der Vyver*, 2 E. D. C. 81.

pond, or reservoir which is not kept replenished by a running stream.⁷⁵ Such a servitude, however, when once properly constituted, will not be extinguished in case the source from which the water is derived should happen to dry up and the water cease to run, even for so long a period as that required for prescription, for the servitude will revive as soon as the water recommences to flow.⁷⁶

With respect to the servitude of mere passage for water, it may be premised that whenever a person who has a legal right to any water or to the use of water or is entitled to superintend and control the use of water, wishes to employ it or to increase its employment for irrigation or domestic use or the use of stock, or any other useful purpose, he will be entitled to claim any one or more of the following servitudes either temporarily or in perpetuity under and by virtue of the provisions of the Irrigation Act of 1906, namely, a servitude of aqueduct, a servitude of storage, and a servitude of abutment.⁷⁷ This servitude of aqueduct is defined as the right to occupy for and in connection with the passage of water such land belonging to another person as may be necessary for that purpose, and includes the right to construct such works as are necessary for the passage over, under, or alongside of another irrigation work, and the temporary occupation of a strip of land and of access thereto for the purpose of constructing the necessary works, and for purposes of inspection, maintenance, and repairs.⁷⁸ The servitude of storage is the right to flood a neighbour's land by means of a dam

⁷⁵ Voet, 8: 3: 6; 8: 4: 17; G. 2: 35: 14. See also *per* Watermeyer, J., in *Dreyer v. Ireland*, 4 Buch. 199.

⁷⁶ Voet, 8: 3: 6.

⁷⁷ Act 32, 1906, sec. 86, *et seqq.* See also Act 26, 1882.

⁷⁸ Act 32, 1906, sec. 87.

constructed on one's own land but which throws back the water on to the land of the neighbour.⁷⁹ The servitude of abutment is the right to occupy by means of a dam or weir so much of the bed of a river, and of the banks adjacent thereto, the property of another, as may be necessary for the purposes of such dam or weir.⁸⁰

As regards public or perennial streams it must be borne in mind that no riparian proprietor has any right to the water in such stream or to the use of the same until it has actually arrived upon his ground, and consequently, in the absence of any right acquired by prescription or contract or in some other lawful manner, he will not be entitled to lead out his share of the water by means of any works constructed on the ground of an upper proprietor at a point on the stream above the limits of his own ground.^{80a}

With respect to both the common law kinds of servitudes of water-leading, it may be stated generally that they may be granted in favour of several dominant tenements at one and the same time, provided that the watercourse or passage-way, in the one case, and the supply of water, in the other, are sufficient for all of them.⁸¹ As regards both also, it may be laid down that, when they have been granted in general terms without defining the route along which they are to be exercised, the owner of the dominant tenement may select any route over the servient property which may be most convenient for himself; but he is bound to exercise his right of selection in a kindly manner, and so that the servitude may be as little burdensome as possible to the servient tenement.⁸² If there is any dispute as to

⁷⁹ Act 32, 1906, sec. 88.

⁸⁰ *Ibid.*, sec. 90.

^{80a} *Greeff v. Keller*, 2 Buch, App.

C. 310.

⁸¹ Voet, 8: 3: 6.

⁸² *Ibid.*

the route to be taken, it may have to be decided by arbitration or by action.⁸³ The owner of the servient tenement, however, is not prevented from afterwards making a change in the route first selected or agreed upon, provided that this can be done without prejudice to the rights of the dominant tenement.⁸⁴ This principle has been carried so far that where a lower proprietor is entitled to a reasonable share of the water flowing in a certain artificial watercourse upon the land of an upper proprietor, *which had by long usage acquired the character of a natural watercourse*, the owner of the upper or servient property has been held entitled to point out which route or direction such watercourse should take, provided the lower proprietor gets his reasonable share of the water in an equally convenient manner.⁸⁵ The owner of the dominant tenement, in his turn, may do anything to or make any alteration in the watercourse whereby his use of the water may be facilitated, *e.g.*, he may replace the watercourse by a pipe, provided the rights of the servient property are not thereby prejudiced ;⁸⁶ but he is not entitled to take materials from the servient tenement for the purpose of repairing his furrow, though he may use the stuff taken out of such furrow for that purpose.⁸⁷

The servitude of water-passage and water-leading often exists in the form of a common furrow passing over or traversing several farms in succession, the owners of which are each in turn entitled to draw their share of water therefrom. In such a case an upper proprietor, in the absence of any special provision to the contrary, may during his turn divert his

⁸³ *Ibid.*⁸⁴ *Ibid.*⁸⁵ *Van der Byl v. Myburgh*, 2 S. C. 77.⁸⁶ Voet, 8: 4: 16; D. 39: 3: 17: 1; 42: 20: 3: 5. See also *Wolvaardt v. Pienaar*, 1 S. Af. Rep. 162.⁸⁷ *Steyn v. Zeeman*, 20 S. C. 221.

share of the water from the furrow at any point whatsoever, where it may be most convenient for him to do so, but is bound at the end of his turn to close up all openings made by him in the banks of the furrow for purposes of irrigation,⁸⁸ and is in addition bound to arrange his water-leading in such a way that at the end of his turn the full stream is ready at the point of exit of the common furrow from his property to flow down free and undisturbed to the proprietor who is next entitled to receive it.⁸⁹

The servitude of water-leading will include any registered agreement between riparian proprietors whereby their common-law rights are in any way altered or modified for their mutual benefit. Such agreement will be permanently binding upon the properties to which they refer. Hence it has been decided that where the manner in which the water, to which each is entitled by law, is to be used has been arranged by duly registered agreement between an upper and a lower riparian proprietor, and the upper property is subsequently subdivided without reference to the lower proprietor, the proprietors of the subdivided shares of the upper property will be conjointly responsible for the carrying out of the agreement, provided the water rights of the two properties under the agreement are mutually interdependent.⁹⁰

The servitude of water-leading may be granted either generally or for a particular purpose. Thus in the case of *Joubert v. The Worcester Municipality and the Colonial Government*, in which the Government had made a grant of land for the purpose of erecting a mill, subject to the condition that "the

⁸⁸ *Botha v. Dreyer*, 1 E. D. C. 74.

⁸⁹ *Nel v. Du Toit*, 14 S. C. 199.

⁹⁰ *Viljoen and others v. Hamman and another*, 14 S. C. 246.

proprietor shall have no right or privilege whatever with regard to the *main stream* to supply the town of Worcester, save and except of using it for the special purpose of keeping the water-mill at work," it was held that the owner of the dominant tenement was entitled to claim that the whole of such main stream should flow over his mill and to interdict any diversion from such stream above the mill.⁹¹

A further servitude with reference to water is the right of altering the natural drainage of water from one's land so as to discharge it on to that of a neighbour over which it would not have flowed, or in a manner different from that in which it would have flowed, by natural gravitation.⁹² This servitude will not entitle the owner of the dominant tenement to lay down a pipe not for the purpose of drainage but of water-leading over the servient tenement.⁹³

The servitude of the drawing of water (*aquezhaustus*) was by the Roman law confined to the right of drawing water from a well, pond, or reservoir which was supplied with living or spring water, and was not applicable to a rain-water tank, because the latter was inconsistent with the principle of the law which required a *causa perpetua* for all prædial servitudes, and there was no *causa perpetua* in water which was not living.⁹⁴ By the Roman-Dutch law, however, this servitude was extended even to the right of drawing water from another's rain-water tank.⁹⁵

This servitude carries with it the right of footpath to the spring or other source from which the water is

⁹¹ *Joubert v. Worcester Municipality and the Colonial Government*, 14 S. C. 304.

⁹² Voet, 8: 3: 11; G. 2: 35: 16-18; V. L., vol. 1, p. 298.

⁹³ *Weintroub and another v. Steer*, 22 S. C. 4.

⁹⁴ D. 43: 22: 4.

⁹⁵ Voet, 8: 3: 7; G. 2: 35: 13; V. L., vol. 1, p. 297; V. D. L. 168.

drawn, in favour of the owner of the dominant tenement, and when the dominant and servient tenements are on different sides of a river forming the boundary between them, it also implies the right to a footbridge across the river.⁹⁶

Like all other servitudes, the servitude *aquæhaustus* will require to be strictly interpreted and will have to be exercised in a kindly manner. Consequently, where the dominant and servient tenements had originally formed one property held in two undivided shares, and upon the subdivision it was agreed that each of two springs situate on the servient property should belong to and be enclosed by each of the owners, it was held that the owner of the dominant tenement had not any property on the ground within the enclosure placed by him round his spring, but only a servitude or right of drawing water, entitling him to carry away all the water supplied by it, if he required it, but that it did not give him the right to use the enclosure for the purpose of washing and drying clothes.⁹⁷

The owner of the servient tenement is not prevented from enclosing his land, but must always leave free access to the source of the water supply by means of a gate or otherwise.⁹⁸ Any obstruction to such access, whether absolute or merely of such a nature as to make the access more difficult, will entitle the owner of the dominant tenement to an action of damages.⁹⁹

Any costs incurred in keeping the well, spring, or tank clean and in repair will have to be borne by the owners of the dominant and servient tenements in common, but the owner of the dominant tenement may

⁹⁶ *Hawkins v. Munnik*, 1 Menzies, 466; Voet, 8: 3: 7; 8: 4: 16; G. 2: 35: 13.

⁹⁷ *Landman v. Daverin*, 2 E. D.

C. 1.

⁹⁸ Voet, 8: 3: 7; Schorer, Note 217.

⁹⁹ *Kimberley Mining Board v. Stamford*, 1 Buch. App. C. 129.

free himself from future costs by abandoning his right of servitude.¹⁰⁰

The servitude or right of watering cattle (*servitus pecoris ad aquam appulsus*) is the right of watering cattle or other stock at a stream or other supply of spring-water belonging to a neighbour.¹⁰¹ This servitude, as a matter of course, carries with it the right of cattle-road or *actus* to the water, but must be exercised in a kindly manner and with as little injury as possible to the servient property.¹⁰² Where the person who is entitled to it waters more cattle or uses a larger proportion of the water than he has a right to, he may be interdicted.¹⁰³ Where the owners of the dominant and servient tenements are both entitled to water their stock at the same dam or source of supply, all the stock which *bonâ fide* belongs to the dominant property may be watered there,¹⁰⁴ but not less than one-half of the water will have to be left for the use of the cattle of the servient property.¹⁰⁵

The width of the cattle-road to be used in driving the cattle to the water will depend upon the size of the dominant tenement and the quantity of stock it can carry. In one case, in which the dominant tenement was capable of depasturing from three to four hundred head of cattle, it was decided that a width of a hundred and fifty yards was sufficient, and it was further held that, in consideration of the distance the cattle had to come to drink, three hours should be allowed them to rest by the stream before undertaking the return journey.¹⁰⁶

¹⁰⁰ Voet, 8: 3: 7; G. 2: 35: 13; Schorer, Note 218.

¹⁰¹ Voet, 8: 3: 11; G. 2: 35: 19 V. L., vol. 1, p. 298.

¹⁰² Voet, 8: 3: 11.

¹⁰³ D. 43: 20: 1: 18.

¹⁰⁴ *Laubscher v. Reve and others*, 1 Roscoe, 408.

¹⁰⁵ *Landman v. Daverin*, 2 E. D. C. 1.

¹⁰⁶ *Laubscher v. Reve and others*, 1 Roscoe, 408.

The enumeration of rural prædial servitudes may here appropriately be brought to a conclusion, not because we have exhausted their number, for every limitation upon the rights of ownership which is placed as a burden upon any servient property for the benefit of a dominant property is a servitude, but because we have mentioned all those which are of most frequent occurrence. Even a prohibition to sell liquor upon the servient tenement would, under such circumstances, amount to a servitude, and be binding upon all owners of such property.¹⁰⁷ Voet also enumerates a number of others.¹⁰⁸

CHAPTER XXV.

THE ACQUISITION OF PRÆDIAL SERVITUDES.

PRÆDIAL servitudes, being deprivations of the rights of ownership, can only be constituted in the same way as ownership itself can be alienated and dealt with.

A servitude can only validly be constituted or granted by the person in whom the ownership or *dominium* of property is vested, and he who has merely the revocable *dominium* of land, *e.g.*, under a *fideicommissum*, can only burden the land with a servitude for so long as his own *dominium* lasts,¹ and only to the extent of his own rights of ownership, if these are limited in any way.² One of several coproprietors of land in undivided shares, therefore, cannot by himself and without the consent of the

¹⁰⁷ *Consistory of Steytlerville v. Bosmin*, 10 S. C. 67.

¹⁰⁸ Voet, 8: 3: 11, 12. See also V. L., vol. 1, p. 299.

¹ Voet, 8: 4: 11; G. 2: 37: 6; *Engelbrecht and others v. Brits and others*, (1906) T. S. 287.

² *Cloete v. Ebdon*, 2 Menzies, 293.

others impose a servitude upon the common property ;³ though he may validly acquire a servitude in favour of the common property.⁴

At the present day a prædial servitude may be acquired not only by the real owner of the dominant tenement, but by one of several coproprietors for the benefit of all, and even by a third party.⁵ In any case, however, it is acquired not for a person, but for a property, namely, for the dominant tenement. And it would appear that a servitude, such as a right of road, may be acquired even in favour of a native location.⁶

As regards the mode of acquiring servitudes, it may be stated generally that the only ways in which they can be established are (1) by registered grant, (2) by prescription, and (3) by decree of Court, though other modes of acquisition are mentioned by the text-writers, which will be treated of in their due place.

For the purpose of establishing a valid prædial servitude by agreement, that is, a servitude which shall be a real burden upon the servient property, and inseparable from it, a deed of grant in express terms, duly registered against the servient tenement in the office of the Registrar of Deeds, is absolutely essential.⁷ The mere reference in general terms in a transfer of land to a deed of sale, by one of the clauses of which the seller agreed to constitute a servitude over some property retained by him in favour of the property

³ Voet, 8 : 4 : 9 ; 8 : 2 : 17 ; G. 2 : 36 : 2 ; V. L., vol. 1, p. 280.

⁴ Voet, 8 : 4 : 10 ; 8 : 5 : 1.

⁵ Voet, 8 : 4 : 10 ; Groen., De Leg., D. 8 : 3 : 19 ; *Jansen & Horne v. Ysel*, 1 S. Af. Rep. 6.

⁶ *Farni v. Macdonald*, 6 S. C. 165.

⁷ *Parkin v. Titterton*, 2 Menzies, 296 ; *Steele v. Thompson*, 13 Moore's

P. C. C. 280 ; *Jansen v. Fincham*, 9 S. C. 289 ; *Bower v. Colonial Government*, 13 S. C. 158 ; *Judd v. Fourie*, 2 E. D. C. 41 ; Voet, 8 : 1 : 6 ; 8 : 4 : 1 ; 1 : 8 : 20 ; Groenewegen's Note 1 to G. 2 : 36 : 2 ; V. D. K., Th. 369 ; V. L., vol. 1, p. 280 ; *Houtpoort Mining and Estate Syndicate v. Jacobs*, (1904) T. S. 105 ; *Steffens v. Bain*, 20 S. C. 1.

sold, will not in itself be sufficient to constitute such servitude.⁸

Where land, which is subject to a servitude of trekpath or right of passage for cattle, is subdivided, each of the subdivisional transfers will have to contain a reference to the servitude in order to preserve it.⁹

The object of the registration is the protection of the creditors of the owner of the servient property and other third parties whose interest it is to be informed of the fact that such property is burdened with servitude, just as in the case of the transfer and hypothecation of land, and it is intended to serve as a notice to all such persons and to the world at large. But whenever there has been express notice, the necessity for this constructive or general notice by means of registration ceases, and the servitude will be binding upon the person who has such express notice, though it may not have been registered.¹⁰ Registration, therefore, is not necessary as between the original grantor and grantee of a servitude,¹¹ nor as between any future owner of the dominant tenement and a purchaser of the servient tenement who had notice at the time of his purchase of the existence of the servitude;¹² but the agreement to grant the servitude in the one case, and the notice of its existence in the other, will require to be clearly and distinctly proved.¹³ It follows that a servitude cannot, as a general rule, be granted by

⁸ *Steele v. Thompson*, 13 Moore P. C. C. 280; *Botha, Smit and others v. Kinnear, Kotze*, 215.

⁹ *Ex parte Kotze*, 22 S. C. 170.

¹⁰ *Judd v. Fourie*, 2 E. D. C. 41; *Hansen & Schrader v. Colonial Government*, 20 S. C. 446.

¹¹ *Jansen & Horne v. Yzel*, 1 S. Af. Rep. 6; *Ahlbom v. Vickers*, 9 S. C. 484; V. L., vol. 1, p. 280.

¹² *Judd v. Fourie*, 2 E. D. C. 41; *Richards v. Nash*, 1 S. C. 312; *Heidelberg Municipality v. Rys*, 15 S. C. 156; *De Villiers v. Erasmus*, 1 S. Af. Rep. 138; *Weilbach v. Diedrikse*, 3 Off. Rep. 80.

¹³ *Ahlbom v. Vickers*, 9 S. C. 484; *Jansen v. Fincham*, 9 S. C. 289; *Pienaar v. Van Zyl*, 16 S. C. 260; Voet, 19: 1: 6.

implication. Thus Voet says: "If the owner of two houses has sold them to different persons or has sold one and kept the other as a residence for himself, if one of them has been accustomed to receive the rain-water dripping from the eaves of the other, or has supported a beam or had some portion of the other's building projecting over it, or something similar which cannot be enjoyed or done without a servitude, the better opinion is that these properties need not be transferred to the purchasers together with this sort of rights, viz. the advantages to the one and the disadvantages to the other, unless a servitude has been expressly imposed or unless the buildings have been sold with the addition of the words '*as they now are.*'" ¹⁴

Servitudes may be granted not only simply, but also conditionally, or from or up to a certain time, or for a particular purpose, or with certain limitations. ¹⁵

The next in importance of the modes of acquiring servitudes is prescription, that is to say, the continuous user and enjoyment of the rights involved in the servitude for the period of time required for the acquisition of immovable property by prescription, that is, for thirty years. ¹⁶ It is essential to the efficacy of such prescription that the user and enjoyment shall have been open and peaceful, and yet at the same time adverse to the owner of the servient tenement, or, as the Roman lawyers put it, *nec vi, nec clam, nec precario*, for an enjoyment which takes place with violence or by stealth or with leave and license of the owner of the

¹⁴ Voet, 19: 1: 6; 8: 6: 3; V. L., vol. 1, p. 283; *Salmon v. Lamb's Executor and Naidoo*, 24 S. A. L. J. 73; *Grahamstown Journal*, Jan. 17 and 19, 1907. But see Grotius, 2: 36: 6, who is of a directly opposite opinion.

¹⁵ Voet, 8: 1: 2; 8: 4: 7, 18; G. 2: 36: 7.

¹⁶ Voet, 8: 4: 6; G. 2: 36: 4; V. L., vol. 1, p. 281; Act 7, 1865, sec. 106; *Aberdeen Municipality v. Aberdeen Dutch Reformed Church*, 22 S. C. 490.

servient tenement is of no effect for purposes of prescription.¹⁷

It is above all things necessary that the enjoyment be adverse. In the case of an affirmative servitude, that is, one by which the owner of a dominant tenement is entitled to do something upon or with respect to the property or real rights of another, the mere enjoyment of the right in question is in itself an adverse act, that is, an act conflicting with the rights of the owner of the servient tenement. Thus, where a person has used a certain road or a dam constructed upon his neighbour's land or has cut wood upon the same for the period of prescription, or where an upper riparian proprietor has for the same periods used the whole or a fixed quantity of the water of a public stream to the exclusion of a lower proprietor, the enjoyment is patently adverse, and a prescriptive servitude will by these means have been acquired by the person exercising these respective rights.¹⁸ But in the case of a negative servitude, that is, one by virtue of which the owner of the servient property is prevented from exercising some of his rights of ownership on his own property, inasmuch as such owner is under no obligation to exercise all his rights at all times, it being at his option (*res meræ facultatis*)¹⁹ whether he will do so or not, his mere abstention from exercising any particular right for any length of time, though it may afford a neighbour some enjoyment, can give him no right to demand the continuance of such absten-

¹⁷ *Southey v. Schoombie*, 1 E. D. C. 292; *Queen v. Schultz*, 13 S. C. 197; Voet, 8: 4: 4, 5; Schorer, Notes 214, 219; V. L., vol. 1, p. 282.

¹⁸ *De Klerk v. Niehaus*, 14 S. C. 302, and 15 S. C. 1; *Rossouw v. Burgers and others*, 1 S. C. 119;

Dobie v. Schikerling, 2 Searle, 94; *Glass v. Palmer & Palmer*, 13 E. D. C. 83; *Queen v. Schultz*, 13 S. C. 197; *Aberdeen Municipality v. Aberdeen Dutch Reformed Church*, 22 S. C. 490.

¹⁹ Schorer, Note 213.

tion.²⁰ In such a case it is essential that the enjoyment be adverse, and the abstention on the part of the neighbour compulsory, and not merely dependent on his own free will; in other words, it is necessary that the neighbour shall have attempted to exercise the right belonging to him but claimed by the owner of the dominant tenement, and shall have been prevented from so doing by the latter, or, to put it in another way, that there shall have intervened some act by which the latter has asserted the right, with the result that the former has yielded to that assertion for the period of prescription.²¹ Hence, where the upper of two riparian proprietors on a public stream has allowed his share of the water of such stream to flow past for more than thirty years without using it, and the lower proprietor has for the same period diverted the whole of the water of the stream by means of works constructed on his own ground and used it there, it has been held that the user by the lower proprietor not having been adverse, inasmuch as the lower proprietor had merely precariously enjoyed what the upper proprietor was at perfect liberty to abstain from using, there could be no question of prescription, and consequently there was nothing to prevent the upper proprietor from using his share of the water for the future.²² It would be different if the lower proprietor had for the period of prescription diverted and used the whole of the water of a stream by means of a dam and watercourse situate upon the upper property,

²⁰ Voet, 8: 4: 5.

²¹ *Farni v. Macdonald*, 6 Buch. 165; *Jordaan and others v. Winkelman and others*, 9 Buch. 79; *Lind v. Gibbs & Cooper*, 12 S. C. 287; V. L., vol. 1, pp. 206, 291, 292.

²² *Jordaan and others v. Winkelman and others*, 9 Buch. 79; *De Klerk v. Niehaus*, 14 S. C. 310; *Southey v. Schoombie*, 1 E. D. C. 286; Voet, 8: 3; 6; 8: 4: 5.

which would be of the nature of a positive or affirmative servitude.²³ In the latter case the user would be distinctly adverse so far as the dam and watercourse and the water diverted by their means are concerned, and would give the owner of the lower property a prescriptive right to the dam and watercourse and the water actually diverted by means of the same.²⁴ As regards the water in the stream above the dam, the servitude, if any, would be of a negative character, for the purpose of which the user by the lower proprietor would require to be personally adverse, as shown above. With respect to such water, therefore, the existence of the dam and watercourse will give the lower proprietor no right, but the upper proprietor will retain his right, as a riparian proprietor, to a reasonable share of the water in the stream, and this stream he may use upon his ground, not only above but below the level of the lower proprietor's dam and watercourse.²⁵ But how, if the dam of the lower proprietor is situate at the point where the stream enters the upper farm, and the upper proprietor acquires a right of taking out water still higher up by obtaining the grant of a servitude of water passage from a still higher proprietor in terms of Act 26 of 1882, or otherwise? In such a case it is submitted that, if the decision in the case of *De Klerk v. Niehaus* is correct, there would by analogy be nothing to prevent the upper proprietor from diverting his share of the water by means of such acquired right of passage and using it upon his own farm.

²³ Voet. 8: 3: 6.²⁵ *De Klerk v. Niehaus*, 14 S. C.²⁴ *De Klerk v. Niehaus*, 14 S. C. 302, and 15 S. C. 1. 302.

Similar reasoning to the above would apply to the *servitus non altius tollendi* and other negative servitudes.²⁶

It was at one time doubted whether prescription would run against the Crown,²⁷ but it has since been decided more than once that it does so run in respect, at any rate, of property capable of alienation by the Crown,²⁸ and, consequently, also in respect of servitudes over such property.²⁹

Where a prescriptive servitude is claimed over property situate in a territory annexed to the Colony within thirty years of the making of the claim, it is necessary to prove that, by the laws and customs in force in such country previous to the annexation, acquisition of servitudes by prescription was recognized.³⁰

The term prescription is sometimes erroneously used for certain shorter periods of occupation and enjoyment which would more correctly fall under the head of estoppel. Thus it is stated by Grotius that "a building which has stood for a year and a day without any objection being made, is thereby sufficiently prescribed, saving reasonable compensation to the party injured."³¹ But the doctrine may be more correctly put as follows: If any one has, without the grant of a servitude, but with the knowledge and without any interference on the part of a neighbour, built anything upon his own ground or upon that of his neighbour which implies a right or servitude, *e.g.*, by building on

²⁶ Voet, 8: 4: 5.

²⁷ *Rossouw v. Burgers and others*, 1 S. C. 119; *Municipality of Swellendam v. Surveyor-General*, 3 Menzies, 578.

²⁸ *Municipality of Frenchhoek v. Hugo*, 2 S. C. 248; *Blanckenberg v. Colonial Government*, 11 S. C. 90;

Voet, 44: 3: 11.

²⁹ *Schoof v. Weyer*, 5 E. D. C. 33; *Q. v. Adams*, 17 S. C. 544.

³⁰ *Farni v. Macdonald*, 6 Buch. 165.

³¹ G. 2: 36: 5. See also V. I., vol. 1, p. 282.

the wall of a neighbour or inserting a beam into it, or if, the work having been completed without his knowledge, the neighbour has afterwards, for a year and a day, omitted to object or to demand the destruction of the work, he will be estopped from demanding destruction, and will have to be satisfied with such compensation in damages for any injury done to his property.³²

Akin to prescription is another mode of acquiring servitudes mentioned by the text-writers, namely, antiquity (*vetustas*), that is, immemorial usage or custom.³³ This, however, applies not to private servitudes in favour of certain particular dominant properties, but to rights which belong to the public at large without reference to any ownership of property.³⁴ The effect of immemorial usage is to stamp with the seal of publicity and to declare to be of public right rights which would otherwise not, in the nature of things, necessarily be public. As was pointed out by De Villiers, C.J., in the case of *Ludolph and others v. Wegner and others*,³⁵ "it bears a close analogy to proof of prescription, but it is not the same thing. An immemorial custom or usage does not depend upon the acts of any particular individuals, whereas a servitude by prescription can only be acquired upon proof of user by the person claiming the right, and by those from whom his title is derived." The distinction has already been dealt with above, when, in treating of water-rights, we pointed out that a stream which in the first instance was a private stream by reason of its

³² *Pike v. Hamilton, Ross & Co.*, 2 Searle, 196; Voet, 8: 4: 6, 18; V. L., vol. 1, p. 283. See also *Christie v. Haarloff and others*, 4 H. C. 349; *Myburgh v. Jamison*, 2 Searle, 8; *Essack v. Winter*, 2 S.

Af. Rep. 242.

³³ D. 39: 3: 1: 23; 39: 3: 2.

³⁴ Voet, 8: 2: 5.

³⁵ *Ludolph and others v. Wegner and others*, 6 S. C. 198.

rising on private ground might, by reason of its having since time immemorial flowed beyond that ground in a defined channel, become a public stream, and subject to the law with respect to public streams, although no servitude with respect to it may have been acquired by the owner of any lower property.³⁶ By immemorial use also, an artificial watercourse may acquire most of the characteristics of a public stream,³⁷ and even an artificial drain may come to be regarded in law as a natural depression in the ground and subject to the principles attaching to natural drainage.³⁸ In a similar way a road, which in the first instance was merely in the position of an aggregate of reciprocal servitudes of rights of way subsisting between a number of neighbouring properties, may by immemorial usage be converted into a public road.³⁹

Servitudes may properly be created by legislative authority, as where by a Municipal Regulation a limitation is placed upon the rights of owners of land within the Municipality to build in any manner they please upon their own land, *e.g.*, by fixing the mode of such building, limiting the height to which buildings may be raised, etc.⁴⁰

A servitude may also be established by a decree of Court in a partition suit or in an action in which the owner of the dominant tenement claims a servitude against the servient tenement either on the ground of contract, prescription, or otherwise.⁴¹ The Court would usually, however, in such a case, order a registration of the servitude, and in that case the servitude

³⁶ See p. 117, above.

³⁷ See p. 108, above.

³⁸ See p. 131, above.

³⁹ See p. 199, above.

⁴⁰ Voet, 8: 2: 5.

⁴¹ Voet, 8: 4: 2; G. 2: 39: 12.

would owe its validity as much to the registration as to the judgment. A judgment of the Court will, however, in any case, bind all successors in title to the owner of the servient property, whether registered or not, and so also would an award of arbitrators.⁴²

It is further stated by the text-writers that a servitude may be granted by way of bequest;⁴³ but as this doctrine is based upon the Roman law rule that, in the case of an unconditional legacy of a specific thing, the ownership in the thing passes *ipso jure* direct from the testator to the legatee without the necessity of any transfer or delivery,⁴⁴ which rule, it is submitted, as was shown above,⁴⁵ no longer obtains in our law, any servitude left by will will be regarded at the present day as acquiring its validity, not from the will, but from the registration of the servitude, which the executor will be obliged to grant in terms of the bequest.

Lastly, it is said by the text-writers and by the authorities on the Roman law that a servitude may be created by *nature*;⁴⁶ but all that is meant thereby is that the owners of land are entitled to claim that the natural surroundings of their land and the forces of nature bearing upon it shall be left undisturbed, in so far as is necessary for the proper and reasonable enjoyment of their rights of ownership, as has been sufficiently shown above with respect to the rights of natural drainage and of lateral support.⁴⁷

⁴² *Stimie v. Du Preez*, 5 Searle, 167.

⁴³ Voet, 8: 4: 2; 33: 3: 1; 8: 6: 1; G. 2: 36: 3; Inst. 2: 3: 4.

⁴⁴ Voet, 33: 3: 1.

⁴⁵ See Book I. p. 184.

⁴⁶ D. 39: 3: 1: 23, and 39: 3: 2.

⁴⁷ See pp. 129 and 103, above.

CHAPTER XXVI.

THE EXTINCTION OF PRÆDIAL SERVITUDES.

PRÆDIAL servitudes are extinguished in one or other of the following ways :—

By renunciation or abandonment of the servitude made by the owner of the dominant tenement.¹ Where the servitude has been acquired by registered grant, it can, as a general rule, only be extinguished in an equally formal manner, namely, by a cancellation of the grant in the office of the Registrar of Deeds, a merely personal agreement not being enough if such cancellation is to be binding on all future owners of the dominant property.² There are, however, some cases in which there may be a tacit abandonment of a servitude, *e.g.*, where the owner of the servient tenement is allowed to do something which necessarily and naturally interferes with the servitude, as where he is allowed to place a building across a piece of ground over which there is a right of way, or erects a building which interferes with a *servitus stillicidii* or with a servitude *ne prospectui* or *ne luminibus officiatur*.³ It makes no difference whether this is allowed under an express agreement or merely with the knowledge of the owner of the dominant tenement and without any objection on his part;⁴ for in the latter case the person who neglects to prohibit his neighbour from proceeding with a work which has come to his knowledge and which he is able and

¹ G. 2 : 37 : 3 ; V. L., vol. 1, p. 300.

² *Hawkins v. Munnik*, 1 Menzies, 465.

³ Voet, 8 : 6 : 5 ; G. 2 : 37 : 4 ;

V. L., vol. 1, p. 300. See also *Braun v. Powrie*, 20 S. C. 476.

⁴ *Edmeades v. Scheepers*, 1 S. C. 334.

competent to prevent is regarded as having consented to it, and cannot, after the completion of the work, demand that it shall be pulled down, but will merely be entitled to compensation for any damage he may have sustained through the construction of the work.⁵

One of several co-proprietors in undivided shares cannot by himself abandon a servitude.⁶

A servitude can only be abandoned as a whole and not in part, a right of servitude being in its very nature indivisible;⁷ but this does not prevent a servitude being abandoned as regards a part of the servient property but retained as regards the rest. Nor will it prevent one of several co-owners in divided shares of the dominant tenement from abandoning the servitude as regards his share, and a similar rule will apply to the case of a servient tenement which is held in divided shares.⁸

A servitude is further extinguished by confusion or merger, that is, when the same person becomes the owner of both the dominant and servient tenements, in accordance with the rule that no one can have a servitude over his own property.⁹ Hence, if several joint owners of property in undivided shares have jointly bought a neighbouring property which is servient to their common property, the servitude becomes lost as a matter of course.¹⁰ But it would be otherwise, according to Voet,¹¹ if two properties, which are under reciprocal servitudes to each other, become the common property of two separate owners, because in such a case each owner by a sort of exchange is

⁵ *Loxton v. Staples*, 1 Buch. App. C. 381; *Edmeades v. Scheepers*, 1 S. C. 334; Voet, 8 : 6 : 5; V. L., vol. 1, p. 301.

⁶ Voet, 8 : 6 : 6.

⁷ *Dreyer v. Letterstedt's Executors*,

5 Searle, 98.

⁸ Voet, 8 : 6 : 6.

⁹ G. 2 : 37 : 2; Schorer, Note 220; V. L., vol. 1, p. 300.

¹⁰ Voet, 8 : 6 : 2.

¹¹ *Ibid.*

regarded as having acquired a part of the other's property and to have in his turn lost a part of his own; the consequence of which is that each, on account of that part which he has retained, must be regarded as having also retained the servitude over that part of the other's property which he has not by the exchange acquired for himself. The same is the case where the owners of the dominant and servient tenements respectively have reciprocally transferred to each other a divided portion of their properties, or if the servient tenement has been acquired by the proprietors not in common but in divided shares, for in that case the right of servitude would be preserved to each proprietor over the portion of the other, for, though a servitude cannot be acquired in part, yet, when once acquired, it may be retained in shares. Again, if the servient tenement has already been divided into shares, and the owner of the dominant tenement afterwards buys one share of it, there is nothing to prevent the servitude continuing over the portion which he has not bought, provided only that the unpurchased portion is of such a size as will allow of the servitude continuing over it. Thus, if a right of road be in the question, and the width of the unbought portion is so small as not to allow of a vehicle passing, the servitude must be held to have been extinguished altogether.¹²

But how if the merger afterwards ceases? In that case it must be inquired whether the merger was from the beginning intended to be permanent, unless something new happened, or whether it was intended to be only temporary and to be dissolved after a time. If the merger was not intended to be permanent, as where only a revocable ownership of the dominant or servient

¹² Voet, 8: 6: 2.

tenement had been acquired, it must be held that servitudes which were extinguished by the merger will be revived after the separation.¹³ On the other hand, if the merger took place without any contemplation of any future separation, unless some new cause should supervene, and separation does afterwards take place, the servitudes, which have been extinguished by the merger, will remain extinct.¹⁴

A servitude is lost also by reason of non-user for the period of prescription, that is, thirty years.¹⁵ There are some cases, however, where servitudes are not lost by non-user, *e.g.*, where a servitude is only intended for occasional use, such as a right of burial, and the occasion for the use has not arisen.¹⁶ The same is the case where the use of the servitude has been rendered impossible by natural causes. Thus, if a spring, which is subject to a servitude of water-leading, dries up and continues dry for the period of presumption, the servitude will lapse for the time being, but will revive if the spring afterwards begins to flow again, even though the period of prescription may have elapsed in the meanwhile,¹⁷ because the whole doctrine of prescription is based upon negligence, as was shown above,¹⁸ and there can be no question of negligence where there has been no possibility of use.¹⁹

Rural servitudes are lost by non-user merely, but in urban servitudes it is necessary that the non-user

¹³ *Salmon v. Lamb's Executor & Naidoo*, 24 S. A. L. J. 73; *Grahams-town Journal*, Jan. 17 and 19, 1907; Schorer, Note 220.

¹⁴ *Salmon v. Lamb's Executor & Naidoo*, 24 S. A. L. J. 73; *Grahams-town Journal*, Jan. 17 and 19, 1907; Voet, 8: 6: 3; Schorer, Note 220.

¹⁵ Voet, 8: 6: 7; G. 2: 37: 7; Schorer, Note 213; V. L., vol. 1, p. 301; Act 7, 1865, sec. 106.

¹⁶ Voet, 8: 6: 11.

¹⁷ *Retief v. Louw*, 4 Buch. 175.

¹⁸ See p. 82, above.

¹⁹ *Retief v. Louw*, 4 Buch. 175; Voet, 8: 3: 6.

shall have been due to some adverse act on the part of the owner of the servient tenement.²⁰

The question may often arise in considering whether a servitude has or has not been lost, especially in the case of prescription, whether there are several servitudes of one and the same kind in question or only one. This question will have to be solved by ascertaining how many dominant tenements there are.²¹ Thus a servitude of right of way is a single servitude, if it is in favour of one dominant tenement, though it may run across several servient properties, so much so that if the right of way has been used over one of the servient tenements and not over the others, the servitude will be preserved even with respect to those over which, for the period of prescription, it has not been used.²² But if several dominant tenements have a right of way or some other servitude over one and the same servient tenement, there are as many servitudes as there are dominant tenements, with the result that the servitude may be lost by one of them, whether by prescription or otherwise, whilst being retained by the rest.²³ :

When the grantor of the servitude has merely a revocable ownership in the servient property, the servitude will terminate *ipso jure* with the expiration of his title.²⁴

A servitude which does not appear registered against the title of the servient tenement, which is the case with one acquired by prescription, will be extinguished by a sale in execution of the servient property, unless, indeed, the servitude is clearly visible upon the property

²⁰ Voet, 8: 6: 11.

²¹ Voet, 8: 2: 5.

²² *Ibid.*

²³ *Ibid.*

²⁴ Voet, 8: 6: 13; G. 2: 37: 6; V. L., vol. 1, p. 301.

itself, such as a *servitus stillicidii* or a *servitus cloacæ*.²⁵

Lastly, a servitude is lost by the destruction of the dominant or servient property ;²⁶ but when the property, such as a building, which has been destroyed is restored, it is only fair that the servitude itself should also be revived.²⁷ Hence the owner of a servient building which has collapsed or been burnt or pulled down can only restore it in such a way that the servitude may be enjoyed in the same way with respect to the restored building as it was before. Nor does it make any difference if between the destruction and the restoration of the building the period of time required for prescription has elapsed, seeing that the owner of the dominant tenement could not compel the owner of the servient tenement to restore the building, and was therefore guilty of no negligence in that respect, negligence being the very basis of prescription. But if the owner of the servient property, which is subject to a *servitus altius non tollendi* or *luminibus non officiendi*, has, whilst the dominant buildings were down, placed or built something on his ground which conflicts with the servitude, and has retained such structure for the period of prescription, the right of servitude will be absolutely extinguished, and will not revive upon the restoration of the dominant buildings.²⁸ Upon the same principle, where a more remote tenement owes a servitude *altius non tollendi*, and the owner of an intervening tenement, which is subject to no such servitude, builds so high upon his ground as to render the servitude useless to the dominant tenement, and

²⁵ Voet, 8 : 6 : 14.

²⁷ Voet, 8 : 2 : 2.

²⁶ Voet, 8 : 6 : 4 ; G. 2 : 37 : 5 ;
V. L., vol. 1, p. 301.

²⁸ *Ibid.*

thereupon the owner of the servient tenement also builds higher, as he may lawfully do, seeing that in consequence of the intervening building no injury is thereby caused to the dominant tenement, the servitude will become absolutely lost, unless before the expiration of the period of prescription the intervening building or obstruction is again pulled down or removed.²⁹

CHAPTER XXVII.

ACTIONS CONNECTED WITH SERVITUDES.

ACTIONS connected with servitudes are of two kinds, being either declaratory of a servitude (*actio confessoria*) or negatory of it (*actio negatoria*).¹

The declaratory action will lie at suit of the owner of the dominant tenement, even though he may be a joint owner with the defendant either in the dominant or in the servient property. An equitable action will also be allowed to the holder of a special hypothec over the dominant tenement.²

The action will lie against whoever interferes with the exercise of a right of servitude,³ except in the case of a *servitus oneris ferendi*, in which the action can only be brought against the owner of the servient property. The action will in any case lie against the latter, and if there are several joint owners, all will have to be joined.⁴ In fact, the declaratory action should properly be brought in the form of a real action

²⁹ Voet, 8 : 2 : 2.

¹ Voet, 8 : 5 : 1.

² *Ibid.*

³ Voet, 8 : 5 : 2.

⁴ *Ibid.*

against the possessor of, and all persons claiming any real right to, the alleged servient tenement, to have the servitude declared in favour of the dominant tenement and to have the possessors and occupiers of the servient tenement interdicted from interrupting the enjoyment of the servitude; but there is no legal objection to having a disputed right of servitude tried indirectly by a personal action of damages⁵ or in an action of trespass.⁶ The object of the action is to have it declared that the exercise of the servitude shall be left free and undisturbed and to have the defendant interdicted from interfering with it, and further to obtain compensation at the same time for any loss the plaintiff may have suffered by reason of any past interference.⁷ It may even aim at compelling the defendant to repair the wall in the case of the *servitus oneris ferendi*, or to raise his wall higher in the case of the *servitus altius tollendi*, and to restore the property to its original condition before the interference with the servitude took place.⁸

The declaratory action will be barred by renunciation or waiver, and also whenever the servitude has become useless to the dominant tenement owing to something for which the defendant is not responsible, but, as pointed out above, the action will revive, if the utility of the servitude is restored within the period of prescription.⁹

The negatory action will lie at suit of the owner of property against which a servitude is being claimed in favour of another property, to have it declared that the former property is either altogether free from

⁵ *Saunders v. Executors of Hunt*,
2 Menzies, 295.

⁶ *Hofmeyer v. Hofmeyer*, 5 Buch.
141.

⁷ Voet, 8: 5: 3.

⁸ *Ibid.*

⁹ Voet, 8: 5: 4.

servitude or at any rate is not obliged to allow it to be exercised in the special mode claimed by the owner of the latter.¹⁰ Where any encroachment has been made upon the plaintiff's property or injury done to it in the attempt to enforce the alleged right of servitude, the action may include a claim for the restoration of the property to its original condition and the removal of the encroachment or object causing the injury.¹¹ It may also aim at obtaining damages and an interdict.¹²

CHAPTER XXVIII.

MORTGAGE, ITS NATURE AND KINDS.

THE word mortgage is a generic term comprising *hypothec* or mortgage proper on the one hand and *pledge* on the other, the latter being constituted by actual delivery of possession and the former without. The word also covers what is more usually expressed by the term *lien*, that is, the right of retaining property, of which one is in actual possession, until a debt is paid, and which may be classed and will be treated of hereafter under the class of special legal mortgages.

The terms "mortgage" and "pledge," again, are used both with respect to the contract of mortgage and pledge and to the real rights which are the subject-matter of the same,¹ but, if used without any qualification, it is more usually the real rights and the

¹⁰ Voet, 8 : 5 : 5.

¹¹ *Ibid.*

¹² *Ibid.*

¹ Voet, 20 : 1 : 1.

privileges attaching to the same that are intended to be referred to. By mortgage in this more limited sense is meant the real rights possessed by one person, who is called the mortgagee or mortgage creditor, over the property of another, who is called the mortgagor or mortgage debtor, as security for the payment or fulfilment of a debt or some other personal obligation due by the latter to the former,² and entitling the former to have his claim satisfied out of the proceeds of the property mortgaged in preference to other creditors of the mortgagor who have not a prior or better right.³ This real right attaches and adheres to the mortgaged property itself as a deduction from the rights of the owner thereof, and varies in degrees of completeness according to the different kinds of mortgage, from the complete rights of possession and control over the ownership possessed by the pledgee of movable property to the more general preference over the assets of an insolvent estate belonging to the holder of a general conventional mortgage or general bond.

Mortgage has its origin either in contract or in the fact of the existence of certain legal relations between the parties to it, from which the law presumes or upon which it imposes a certain contractual or quasi-contractual relationship. This variety of origin gives rise to the first division of mortgages into Conventional and Tacit or Legal, to which must be added a third class, namely, Judicial mortgages.⁴ Conventional and legal mortgages are each, again, divisible into general and special,⁵ so that mortgages are either conventional general or special, legal general or special,

² G. 2: 48: 1.

³ V. L., vol. 2, p. 89.

⁴ G. 2: 48: 7, 8, 9.

⁵ Voet, 20: 1: 2.

or judicial, judicial mortgages being in their very nature special only.

A general mortgage is one which extends over all the property of the debtor of every description whatsoever, present as well as future, that is to say, as well property already acquired at the time of the mortgage coming into force as property acquired later on during the continuance of the mortgage,⁶ movable as well as immovable, freehold as well as quitrent, corporeal as well as incorporeal.⁷ It does not, however, where the debtor is a fiduciary, cover the fideicommissary property itself, though it will cover the fiduciary's interest in such property.⁸

A special mortgage is one which attaches only to certain specific portions of the debtor's property, which may be either individual articles or a collection of articles (*universitas rerum*), such as a flock of sheep or the stock-in-trade of a certain mercantile business.⁹ Such a mortgage will cover not only the property originally mortgaged, but also all subsequent accessions to the same. Thus if a flock of sheep is mortgaged, even the subsequent natural increase to such flock will be liable to the mortgage, so much so that if, by the death of all the original members of the flock, the flock has become practically a new one, the mortgage will still continue in force. So also if the stock-in-trade of a mercantile business is mortgaged, and such goods have been from time to time sold and replaced by others, all the goods subsequently brought into the business and found on the business premises will be covered by the mortgage.¹⁰ The

⁶ *In re Buissonne*, 1 Menzies, 322, 330.

⁷ Voet, 20: 1: 6; G. 2: 48: 23; Schorer, Note 255.

⁸ Voet, 20: 1: 7; Schorer, Note 255.

⁹ *Francis v. Savage and Hill*, 1

S. Af. Rep. 36; Voet, 20: 1: 2.

¹⁰ *Ibid.*

same is the case where landed property is increased in size by the formation of alluvion or the appearance of an island in a river fronting such land, as also where the mortgagor at the time of the granting of the mortgage has merely the bare ownership of the property originally mortgaged without the usufruct, and afterwards acquires the usufruct, where additions or improvements are made to the property,¹¹ and where the mortgaged property is converted into a new thing, provided that the conversion is not of such a character as to cause the loss of the property by *specificatio*.¹²

There are four essentials to every mortgage, namely, (1) a principal obligation to which the mortgage is accessory, (2) a thing or things to which the mortgage or real right is to attach, (3) a mortgage contract or quasi-contractual relationship subsisting between the parties, and (4) some act or fact by which the real right is constituted or through which it is brought into existence or takes effect.

(1) As regards the original obligation to which the mortgage is accessory, it may be any obligation whatsoever which, in case of non-fulfilment, is capable of being converted into a money value by means of a claim for compensation, but as a general rule it is a money debt. It need not necessarily subsist between the same parties as the mortgage itself, but may, when the mortgage is conventional, be an obligation subsisting between the mortgagee and some third party.¹³

The principal obligation may be one which is either civil or natural, or both, but, if it is natural only, it must not be one which is prohibited by municipal law.

¹¹ *Oberholster v. Holtman*, 2 Menzies, 346.

¹² Voet, 20: 1: 4.

¹³ Voet, 20: 1: 18.

It may also be a debt which is actually due, or one which is to become due at a future certain date or upon the fulfilment of a condition, or a debt which is wholly uncertain and which may or may not be contracted at some future time, in which case the mortgage will take effect upon the arrival of the day, the fulfilment of the condition or the actual contracting of the debt.¹⁴

(2) As regards the property which may be the subject of a mortgage, all kinds of property which are *in commercio* or which may be alienated, may also be mortgaged, movable as well as immovable, freehold as well as quitrent or life-usufruct, corporeal as well as incorporeal, such as rights of action.¹⁵ Even a mortgage itself may in its turn be the subject of a mortgage.¹⁶

Property belonging to another person cannot be mortgaged without the consent of the owner, whether it be movable or immovable.¹⁷ With our system of registration and execution of mortgages the mortgage of immovable property without the consent of the real owner is, with one exception, practically impossible, unless by means of forgery or by mistake, which would vitiate the mortgage absolutely. The exception to this rule arises where the person in whose name the immovable property stands registered holds the same or a portion thereof on behalf of some other person or persons under a trust which does not stand registered against the title-deed of the property. Such is the case with respect to landed property belonging to the joint estate of husband and wife, but which

¹⁴ Voet, 20: 1: 20; 20: 4: 30.

¹⁵ G. 2: 48: 2, 3; Schorer, Note 240; V. L., vol. 2, p. 89.

¹⁶ Voet, 20: 3: 1, 2.

¹⁷ Voet, 20: 3: 3; V. L., vol. 2, p. 89.

stands registered in the name of the husband. Such property it is physically possible for the husband to mortgage after his wife's death, but if he does so for a debt of his own and not of the joint estate, he will be regarded as having mortgaged only his own share of such property.¹⁸ Consequently a bond passed by the survivor of two spouses, not being the executor of the first-dying, over immovable property belonging to the joint estate, will be set aside by the Court at least as far as regards the half-share belonging to the first-dying,¹⁹ unless the bond was passed for the purpose of raising funds to pay the debts of the joint estate, or which have been utilized for the benefit of the same,²⁰ or unless the property has been disposed of for the benefit of the children of the marriage,²¹ in which case the Court may ratify the act of the survivor; and the mortgage may in any case be ratified either expressly or tacitly by the persons interested in the property illegally mortgaged,²² at least in so far as they themselves are concerned. It may be doubted, however, whether such ratification would have a retrospective effect and be effectual to render the mortgage valid from the date of its original execution, so as to be preferred to the claims of other creditors, which have arisen between that date and the date of the ratification. It is otherwise in the case of the pledge by delivery of movable property belonging to another, which, though void *ab initio*,²³ may afterwards be ratified by the owner either tacitly or expressly.²⁴

¹⁸ Voet, 20: 3: 3; V. L., vol. 2, p. 90.

¹⁹ *Molle v. Executors of Van den Berg*, 1 Menzies, 209; *Williams v. Williams*, 12 S. C. 392.

²⁰ *Van Rooyen v. McColl and others*, 3 S. C. 284.

²¹ *In re Brown*, 7 S. C. 237.

²² Voet, 20: 3: 4.

²³ *Zeederberg v. Trustees of J. Norton & Co. and others*, 3 Searle, 12; Voet, 20: 3: 7.

²⁴ Voet, 20: 3: 4, 6, 7.

In this, no more than in the case of a mortgage of immovable property, does the ratification cause the pledge to have a retrospective effect to the prejudice of other creditors, but in this case it is a matter of no importance whether it does so or not, inasmuch as the pledge, owing to the possession of the mortgaged property being in the pledgee, has the effect of a privileged mortgage, from whatever date it is considered as taking effect.²⁵ It follows that a pledge of another's property will become valid upon the acquisition of the ownership in the property pledged by the pledgor, whether it was originally pledged on the express condition that it should do so in that event or not, and whether the pledgee was or was not aware that the property did not belong to the pledgor.²⁶

If the owner stands by whilst his property is being pledged for valuable consideration to an innocent third party without objecting, the pledge will, as a punishment for his fraud, be held to be valid.²⁷

A partner is not entitled to pledge partnership property in security of a debt due by himself, and in any case not after the dissolution of the partnership.²⁸

(3) The contract of mortgage is a contract whereby one person, who is called the pledgor or mortgagor, agrees to place another, who is called the pledgee or mortgagee, in the actual possession of property belonging to him, or to have the contract, which is in the form of a mortgage bond, registered in the office of the Registrar of Deeds, which property or bond the pledgee or mortgagee shall be entitled to hold and

²⁵ Voet, 20: 3: 4.

²⁶ Voet, 20: 3: 4, 6.

²⁷ Voet, 20: 3: 7.

²⁸ *Zeederberg v. Trustees of J. Norton & Co.*, 3 Searle, 12.

retain until some debt or other obligation due by the pledgor or mortgagor, or by some third party,²⁹ to the mortgagee has been paid or satisfied. Such a contract can only be entered into by persons who are entitled to the administration of their own affairs, and therefore not by minors or other persons who are under curatorship, nor by married women whose husbands are entitled to the administration of their affairs.³⁰

The contract of mortgage bears the same relation to mortgage itself which the contract of sale bears to the *dominium* or ownership of the thing sold, with this exception, that in the case of a pledge of movables the contract of pledge and the constitution of the real right which is involved in the pledge takes place simultaneously, the contract of pledge being one of those contracts which is effected *re*, as it was termed in the Roman law, that is, by delivery of the thing. In the contract of hypothec or mortgage by way of bond or deed the analogy with the case of sale is more complete, inasmuch as it is quite possible for a contract of general conventional mortgage to be entered into and that, for want of registration, no general mortgage may be actually effected thereby, and it is even conceivable that a contract of special conventional hypothec or mortgage of immovable property may be entered into and that, for want of registration of such contract owing to some negligence in the office of the Registrar of Deeds, no special mortgage of such immovable property may be constituted thereby. This contract is what is generally spoken of as a mortgage bond, and must not be confounded with an agreement to grant a pledge or mortgage, which may, of course,

²⁹ *Benjamin v. Benjamin*, 1 E. D. C. 273.

³⁰ N. 2 : 48 : 4, 5 ; Schorer, Note 239.

be entered into, and, if so, is enforceable by an action of specific performance.³¹ Such an agreement may be entered into by mere consent conveyed either verbally or in writing, but the contract of pledge can be concluded only by delivery of the thing pledged, and the contract of hypothec or mortgage only by means of a written contract or bond executed before a notary and witnesses or before the Registrar of Deeds.

No particular form of words is required for the conclusion of this contract, as long only as the intention of the parties is clear, and a contract, which in words and in form purports to be a contract of sale, may in fact be a contract of pledge, and will be construed as such.³² It may be made subject to any condition whatsoever, provided it be not contrary to law or morality. Thus it may be agreed that the original debt or obligation shall be discharged upon the destruction of the mortgaged property, provided such destruction is not due to the fraud or negligence of the debtor or mortgagor, but merely to accident; or that payment of the debt shall not be demandable within a certain time; or that if the debt is not paid within a certain time the creditor may take over the property mortgaged at a certain price;³³ or, in the case of a pledge of movables, that the pledgee shall have the right to sell the same as *procurator in rem suam*, if the debt is not paid. A provision that the creditor is to have the use of the mortgaged property in lieu of interest was under the Roman law called the *pactum antichresios*.³⁴

³¹ *Oberholster v. Holtman*, 2 Menzies, 346; *Phillips & King v. Trustees of Norton*, 2 Menzies, 369.

³² *Hofmeyr v. Gous*, 11 S. C. 115; *Fivaz v. Boswell*, 1 Searle, 235;

Cholwich v. Penny, 5 E. D. C. 270.

³³ Voet, 20 : 1 : 21. But see Voet, 20 : 1 : 25.

³⁴ Voet, 20 : 1 : 23.

The above remarks, of course, apply only to contracts of mortgage which are express. There are some cases, however, in which the law regards such a contract as having been tacitly entered into between two persons, between whom a certain legal relationship subsists involving certain duties and responsibilities from one to the other, for the due fulfilment of which the law allows a right of mortgage or pledge to the latter over the property of the former. Mortgage contracts may therefore be said to be either express or tacit, and this division of such contracts corresponds to the division of mortgages into conventional or contractual on the one hand and tacit or legal on the other. Whether express or tacit, however, the contract of mortgage is in its very nature accessory only, and pre-supposes the existence of some other valid principal obligation, in security of which the mortgage contract is entered into and the mortgage itself granted, and without which neither of these latter can exist.³⁵ Voet does, indeed, mention some exceptions to this rule, that the validity of a mortgage is dependent upon the validity of the original obligation,³⁶ but upon being carefully examined these will be found to be merely apparent and not real exceptions.

(4) As regards the act or fact in which mortgage has its origin, we may here state generally that conventional mortgages have their origin in the registration of the contract of mortgage or in the delivery of the mortgaged property, that legal mortgages arise by force of law without requiring either delivery or registration, and that judicial mortgages take effect upon the attachment of property in execution of a judgment or decree of Court, leaving each of these

³⁵ Voet, 20:1: 18.

³⁶ Voet, 20: 1: 19.

modes of origin to be treated of in detail when dealing specifically with each of the different kinds of mortgage.

CHAPTER XXIX.

THE CONSTITUTION OF CONVENTIONAL MORTGAGES.

WITH respect to the constitution of conventional mortgages, the policy of our law is that it shall take place in such a way as to give due notice of the fact to the world in general and to those persons in particular who may be asked at any time to give credit to the mortgagor in reliance upon the fact that he is the owner of the property mortgaged. With this object in view the law insists that mortgages shall be effected in such an open and public manner that no one can afterwards complain that he has had no notice of them. It has consequently been laid down that a mortgage can only be effected in one or other of two ways, namely, either by actual delivery of the movable property to be mortgaged or by the registration of the bond or contract of mortgage in the office of the Registrar of Deeds. An agreement without either delivery or registration will give no valid preference as against other creditors of the pledgor or mortgagor, even though such agreement may have been executed before a notary and witnesses, but it will be binding as between the parties themselves, and will give the intended pledgee or mortgagee a right of action to compel the specific performance of the contract by granting a proper pledge or hypothec in due form of

law, by delivering the property itself, if it be movable,¹ or by granting a registered bond on the immovable property to be mortgaged.

Movable property may be mortgaged either by the delivery of the property, in which case the mortgage is called a pledge, or by registered bond without delivery, in which case it is spoken of as a special hypothec or bond on movables.² We shall here treat of the pledge of movables, leaving the special hypothec of movables to be treated of when we have dealt with general bonds, to which it is very closely akin.

The pledge of movable property is effected by the actual *bonâ-fide* delivery of the property itself to the pledgee, accompanied by an agreement that it is to be held as security for the payment or fulfilment of some debt or other obligation.³ Such agreement need not be in writing, and, if in writing, need not be registered, provided only that the delivery actually takes place in an open *bonâ-fide* manner.⁴ It will not be enough for the debtor to say that in future he will hold the property pledged in the name and for account of the pledgee either *precario* or on loan, for such agreement will be regarded as in fraud of the other creditors and of the law which requires delivery.⁵ A pledge not accompanied or followed by delivery of the property to the creditor will create no obligation entitling the latter to resort to it in the hands of a third party.⁶ But where the intended pledgee is at

¹ *Stratford's Trustee v. London and South African Bank*, 3 E. D. C. 439; Voet, 2: 1: 12; V. L., C. F., part 1: 4: 7: 4.

² G. 2: 48: 17.

³ G. 3: 8: 1.

⁴ *Brown v. Messenger of the R. M. Court, Queenstown*, 6 Buch. 49; Voet, 2: 1: 12; V. D. L. 176.

⁵ *Guest v. Le Roex's Trustees*, 5 S. C. 119; *Payn v. Yates*, 9 S. C. 494; *Goosen's Trustees v. Goosen*, 3 E. D. C. 387; *Fivaz v. Boswell*, 1 Searle, 235; Voet, 20: 1: 12, 13; 13: 7: 1.

⁶ *Coaton v. Alexander*, 9 Buch. 17; *Smuts v. Stock and others*, 1 Menzies, 297; *In re Liesching*,—

the time of the pledge already in actual possession of the property pledged, there will be no necessity for a fresh delivery to be made in execution of the pledge.⁷

The pledge of an incorporeal right is effected by cession.⁸

It is necessary to add that for the validity of a pledge it is not only necessary that the property shall have been delivered, but also that the pledgee shall remain in continuous possession of the property, for, if at any time the property returns into the hands of the pledgor, the pledge will lapse,⁹ and the property become liable to be attached in execution at suit of other creditors, or, in case of insolvency, will fall into the general estate of the insolvent without the pledgee being entitled to any preference over the proceeds of the same.¹⁰ This rule is amenable to exceptions whenever the exigencies of commercial transactions render such necessary, but such exceptions will only be allowed as the result of some contract stipulating for the possession of the property by the pledgor under circumstances in which such possession is compatible with good faith, and is not calculated to mislead other creditors.¹¹ Where, for instance, a wool-washer, who was at the same time a dealer in wool, had pledged some wool belonging to himself, but which was in the possession of a third party, to a bank, the third party undertaking to hold the wool at the disposal of the bank, and the wool was thereafter left with the

Van der Riet and De Smidt v. Tenant & Co., 3 Menzies, 245; *Heydenrich v. Fourie*, 13 S. C. 371.

⁷ *Assignees of O'Callaghan v. Cavanagh*, 2 S. C. 122.

⁸ *Smith v. Farrelly's Trustee*, (1904) T. S. 949.

⁹ *Guest v. Le Roex's Trustees*, 5 S. C. 119; *Heydenrich v. Fourie*, 13

S. C. 371; Voet, 20: 6: 5.

¹⁰ *Heydenrich v. Fourie*, 13 S. C. 371; *Louw v. Andrews*, 14 S. C. 27; *Keurns v. Cole*, 10 S. C. 63; *Hoymeyr v. Gous*, 10 S. C. 115; Voet, 20: 1: 12, 13.

¹¹ *Heydenrich v. Fourie*, 13 S. C. 371.

wool-washer in the ordinary course of business for the purpose of being washed, this was held not to invalidate the pledge.¹² And where the pledged property had been handed back to the pledgor for a special temporary purpose, but had been returned to the pledgee before being attached in execution by another creditor, it was held that the pledge was still in force.¹³

It must further be observed that where a purchaser accepts movable property from a seller with the knowledge that it had previously been pledged to a third party, such purchaser will have no greater right with respect to such property than the seller himself had—that is to say, he will take the property subject to the pledge.¹⁴

Mortgage by bond is either general or special, the former covering all the property of the mortgagor, both movable and immovable, whilst the latter may be made applicable to any special property of the mortgagor, either movable or immovable.

A special mortgage or hypothec of immovable or landed property is constituted by means of a bond or written contract which requires to be executed before the Registrar of Deeds, a bond executed before a notary and witnesses, even though registered, giving no preference as regards the immovable property purporting to be mortgaged thereby.¹⁵ No such bond will be passed by the Registrar of Deeds, unless it

¹² *Stratford's Trustee v. London and South African Bank*, 3 E. D. C. 439.

¹³ *Van de Venter v. Moss & Webb*, 4 E. D. C. 222; *Colonial Government v. Holt & Holt*, 19 S. C. 271 and 347.

¹⁴ *Coaton v. Alexander*, 9 Buch.

17; *Meyer v. Botha & Hergenröder*, 1 S. Af. Rep. 49.

¹⁵ Ord. 14, 1844, sec. 1; *In re Richardson*, 1 Menzies, 423; *Harris v. Trustee of Buttsinne*, 2 Menzies, 105; *Ogilvie & Mandy, N. O.*, v. *Rorke*, 2 Menzies, 366.

has been prepared in his office, or by an advocate of the Supreme Court, or by a duly qualified conveyancer.¹⁶ The person wishing to execute such bond may appear in person to execute the same or may do so through an agent duly authorized thereto by a power of attorney executed according to law, for where the power is void the bond will also be void, at any rate *quâ* mortgage or as a preference,¹⁷ though it may be valid as a mere acknowledgment of debt.¹⁸

The immovable property of minors cannot be mortgaged by their guardians without the consent or leave of the Court,¹⁹ nor may executors mortgage immovables belonging to the estates under their administration, except in fulfilment of a contract to that effect entered into by the deceased in his lifetime or of special directions contained in his last will, or otherwise with the sanction or leave of the Court, which will not be granted unless it be for the benefit of all parties interested in the estate.²⁰

The pledge of the title-deeds of immovable property will not be effectual as a mortgage of such property or give to the pledgee a preference over the proceeds of the same.²¹

A general conventional mortgage is constituted by means of a bond called a general bond, which may be executed either before the Registrar of Deeds or before a notary and two witnesses.²² Such bond must bear the date and place of its execution.²³

¹⁶ Ord. 14, 1844, sec. 1; Act 12, 1858, sec. 8; Act 19, 1891, sec. 15.

¹⁷ *Basson's Trustees v. Wiese's Trustees and others*, 2 Buch. 12; *Lombard Bank v. Hammes*, 1 Menzies, 524.

¹⁸ *Denysen v. Botha*, 2 Buch. 74.

¹⁹ See Book I. p. 255, above.

²⁰ See Book I. p. 225, above.

²¹ *Kellar's Trustee v. Edmeades*, 3 S. C. 25; *Trustees of Tritsch v. Berrangé & Son*, 3 S. C. 217; *Phillips & King v. Trustees of Norton*, 2 Menzies, 369. See also *Collins v. Hugo and others*, 10 Cape L. J. 344.

²² V. D. L. 177.

²³ Ord 27, 1846, sec. 3.

It may be well to add that it has become the almost invariable custom in the Cape Colony to insert in every special mortgage bond on immovable property a clause called the "General Clause" whereby, in addition to the property specially mortgaged, a general mortgage over all the property of the debtor is constituted.²⁴ In fact, the insertion of this clause is so general that it has been decided by the Court that where a power of attorney authorizes an attorney to appear before the Registrar of Deeds to acknowledge a debt and to pass a mortgage bond in favour of the creditor, the attorney is authorized to insert in the bond any clause which, by the established usage and custom of the Colony, it is the practice to insert in such bonds, and therefore also to insert the general clause in a special bond on immovable property.²⁵

A special bond on movables must be executed in the same way as a general bond, and also registered in the same way, in order to give any preference over the movables specially mortgaged thereby.²⁶

Where a bond, whether special or general, is intended to cover future advances, it must set forth that it is so intended to cover or secure future advances, debts, or demands generally, or some particular description of the same, which must be mentioned in the bond, and some maximum sum must be mentioned as the amount which it is intended to secure thereby.²⁷

²⁴ *In re Carter*, — *Leibbrandt & Geyer v. Dickson & Burnies*, 2 Menzies, 340.

²⁵ *Smith v. Randall's Trustees*, 2 Menzies, 385.

²⁶ *Hare v. Trustee of Heath*, 3 S. C. 32; *Francis v. Savage & Hill*, 1 S. Af. Rep. 33; *Keet v. Dell*, *ibid.*, p. 111; *In re Joosten*, 1 Menzies,

498; *In re Kotze*, 1 Menzies, 371.

²⁷ Ord. 27, 1846, sec. 4; *Brink, N. O.*, v. *The Sheriff and others*, 12 S. C. 418; Voet, 20: 1: 20; 20: 4: 30. Before the enactment of Ord. 27, 1846, the law on this point was different (See *In re Carter*, — *Leibbrandt & Geyer v. Dickson & Burnies*, 2 Menzies, 335; *South African Loan*,

This maximum amount, however, has reference merely to the capital amount and does not include any interest which may have been stipulated for.²⁸

A mortgage bond, whether special or general, is void as a preference unless it is registered in the office of the Registrar of Deeds;²⁹ and in the case of a general mortgage the registration is essential whether the mortgage is intended to affect movable or immovable property.³⁰

In the case of a special mortgage of immovable property, the fact that the mortgagee is placed in possession of the property mortgaged does not increase the strength of the security in competition with other creditors,³¹ though it will give the mortgagee the right of retention as against the debtor himself.³²

Where it is intended to make a bond binding as a preference against a surety as well as against the principal debtor, it will have to be separately registered against the surety, and it will not be sufficient merely to mention the surety in the registration of the bond against the principal.³³

Mortgage, and Mercantile Agency v. Cape of Good Hope Bank, 6 S. C. 185).

²⁸ *Rooth & Wessels v. Benjamin's Trustee and the Natal Bank*, (1905) T. S. 631-632.

²⁹ Publication, May 23, 1805, sec. 6; Ord. 39, sec. 2; Placaat, June 19, 1714; *In re Loudon*, — *Discount Bank v. Dawes*, 1 Menzies, 380; *In re Kotzé*, — *Low v. Trustee and Creditors of Kotzé*, 2 Menzies, 67; *In re Joosten*, — *Kuys, q.q.*, v. *Spengler & Theron*, 1 Menzies, 498; Voet, 20: 1: 11; G. 2: 48: 30; V. D. K., Th. 433; V. L., vol. 2, p. 83. As to the mode of registration, see Publication, May 23, 1805, secs. 7, 8, and Act 19, 1891, sec. 9. See also *In re Carter*, — *Leibbrandt & Geyer v. Dickson & Burnies*, 2 Menzies, 340.

Where through neglect on the part of the Registrar of Deeds the registration has been omitted or not made in the form prescribed by law, this may give the mortgagee a right of action for damages against the Registrar, but will nevertheless invalidate the bond as a preference (*In re Carter*, — *Leibbrandt & Geyer v. Dickson & Burnies*, 2 Menzies, 340; *Cape of Good Hope Bank v. Fischer*, 4 S. C. 368; Voet, 20: 1: 11; Schorer, Note 260).

³⁰ *In re Loudon*, — *Discount Bank v. Dawes*, 1 Menzies, 380; *In re Carter*, — *Leibbrandt & Geyer v. Dickson & Burnies*, 2 Menzies, 335; Voet, 20: 1: 12; G. 2: 48: 28.

³¹ G. 2: 48: 36.

³² V. D. K., Th. 435.

³³ *In re Kotzé*, — *Low v. Trustee*

In the case of a special bond on immovable property the registration takes place immediately upon the execution thereof before the Registrar of Deeds, the mortgage being at the same time indorsed upon the owner's deed of transfer of the property, and upon the duplicate original of the same kept in the office of the Registrar of Deeds.³⁴

Where a general bond or a special bond on movables is executed before the Registrar of Deeds, the registration would also naturally take place immediately, but if before a notary, as is usually the case, it will have to be registered within certain periods, varying according to the distance from Cape-town of the locality where it has been executed,³⁵ though by leave of the Court registration may take place at a later date.³⁶

Besides the mortgage of immovable or movable property, there may also be another form of conventional mortgage, namely, the mortgage of a mortgage, or what may be called a sub-mortgage. This is effected, in the case of a pledge of movables, by the pledgee delivering the property pledged to himself to a third party in security of a debt due by him to the latter; and in the case of a mortgage by bond, by the mortgagee delivering the bond to such third person with a cession indorsed thereon or contained in a separate document attached to it, pledging such bond to the latter in security of a debt due to him.³⁷

and *Creditors of Kotzé*, 2 Menzies, 67; *Van Schalkwyk v. Pienaar*, 15 S. C. 295; *In re Pallas*,—*Executors of Lombard v. Registrar of Deeds*, 2 Menzies, 342.

³⁴ Publication, May 23, 1805, secs. 7, 8; Ord. 39, sec. 2; *Cape of Good Hope Bank v. Fischer*, 4 S. C. 373.

³⁵ Ord. 27, 1846, sec. 1.

³⁶ Ord. 27, 1846, sec. 2.

³⁷ See footnote to *In re Richardson*, 1 Menzies, 423; *Brink's Trustees v. South African Bank*, 2 Menzies, 381; *Bank of Africa v. Harpur*, 4 E. D. C. 252; *Du Plessis v. Van Blerk*, 2 Buch. 68; *Le Roex v. De Villiers*, *ibid.* 90.

In Holland such cession had to be made *coram lege loci* and registered,³⁸ but this is not the case in the Cape Colony.

Where the bond has been merely deposited with a third party without any such cession, it will not entitle the depositary to any right of action or to take any other active proceedings against the original mortgagor.³⁹

The special form of property which is comprised in mining claims, and which is the creature of statute, requires to be hypothecated in terms of the provisions of the statutes dealing with the subject of mining, that is to say, in the office of the Registrar of Claims, and such hypothecation must be registered in a book to be kept for the purpose in that office.⁴⁰

The hypothecation of ships and their cargoes, which is effected by means of *bottomry* bonds, and of cargoes alone, which is effected by *respondentia* bonds, is regulated by the Maritime Law of England, to which, as falling outside the scope of this work, the reader is referred.⁴¹

³⁸ Voet, 20: 4: 35. For Colonial decisions with respect to the mortgage of ships, see *Singleton, In the matter of the "Black Swan," Ex parte Smith*, 2 Menzies, 350; *In re Carter*, — *Leibbrandt & Geyer v. Dickson & Burnies*, *ibid.* 341; *Norden v. Solomon*, *q.q.*, *ibid.* 375. See also G. 2: 48: 5; Schorer, Note 257.

³⁹ *Basson's Trustees v. Wiesé's*

Trustees and others, 2 Buch. 22.

⁴⁰ Act 19, 1883, sec. 22; Act 31, 1898, secs. 42, 90. See also the Griqualand West Ord., No. 10, 1874, schedule, sec. 2, sub-sec. 2; *South African Loan, Mortgage, and Mercantile Agency v. Cape of Good Hope Bank*, 6 S. C. 163; *Whinney, N. O.*, *v. Gardner, N. O.*, 10 S. C. 333.

⁴¹ Act 8, 1878, sec. 1.

CHAPTER XXX.

JUDICIAL MORTGAGE.

JUDICIAL mortgage was under the Roman law represented by the various kinds of *pignus prætorium* and by the *pignus judiciale*. The term *pignus prætorium* was confined to the *missio in possessionem*,¹ which was an interlocutory order granted by the Prætor to a party to a suit for the purpose of protecting property, to which the latter claimed a right, pending the final decision or judgment as to the validity of his claim. The principal kinds of the *missio in possessionem* were: (1) *Immissio damni infecti causâ*, which was granted as a security against damage apprehended from a neighbour's building which was in a ruinous condition; (2) *Immissio legatorum servandorum causâ*, which was granted as security for a legacy which had been bequeathed subject to a condition or which was due only at a future date; (3) *Missio ventris in possessionem*, which was the placing of a pregnant widow in possession of the inheritance of her deceased husband in security of the rights of the expected posthumous child; and (4) the *missio rei servandæ causâ*,² which was granted to a creditor when the debtor, who had been ordered to give security pending the arrival of the day when the creditor would be entitled to claim certain property from him, had failed to give such security. The term *pignus judiciale* was restricted to the case of the attachment of goods in execution of a judgment.

¹ Voet, 42: 4; 43: 4.² Voet, 42: 5.

The *missio in possessionem* of the Roman law has become obsolete under our own law,³ the objects aimed at being attained by other means, and the terms *pignus prætorium* and *pignus judiciale* have by custom come to be used as synonymous, and as applying to the attachment of goods in execution, the former of the two being in more frequent use.

A judicial mortgage is at the present day established by an attachment or seizure of goods made by the Sheriff or Messenger of the Court. It gives the execution creditor a judicial lien over the property attached, as against the debtor himself and all his creditors who have acquired no real right to or over such property, and in fact places him, when the property attached is movable, in the same position as a person to whom movables have been pledged by delivery,⁴ and when it is immovable, in the same position as the holder of a special bond upon such property.

It must be pointed out, however, that, though the attachment gives an execution creditor a preference over other creditors who have not obtained judgment against the debtor, this is not the case as against other judgment creditors who have taken out writs of execution within a certain time of such attachment. By Ordinance 3 of 1844 it is provided that all creditors who lodge writs of execution with the Sheriff or other proper officer for executing such writs within ten days

³ *Mangold Brothers v. Eskell*, 3 S. C. 48; Voet, 42: 4: 6; Groen., De Leg., C. 8: 22; *Matthæus, De Auct.*, p. 248.

⁴ *In re Woelke*,—*Cloete v. Colonial Government*, 1 Menzies, 554; *In re Lond*, 1 Menzies, 483; *Moore v. Van Schoor*, 3 Menzies, 103; *Diering v. F'urney and others*, 1. H. C. 112;

Kearns v. Cole, 10 S. C. 63; *Reed v. Lee*, Kotze, 130; *Meyer v. Botha and Hergenröder*, 1 S. Af. Rep. 47; *Keet v. Dell*, 1 S. Af. Rep. 109; *Keet v. Zeiler & Zerwick*, 1 S. Af. Rep. 18; *Moller v. Natal Bank*, 1 Off. Rep. 78; *Natal Bank v. Martinis & Co.*, 2 Off. Rep. 122; *Quin & Co. v. Mego*, 2 Off. Rep. 141.

from the day on which was or were lodged the writ or writs under and in virtue of which a levy has been made, shall be entitled to rank *pari passu* upon such proceeds, and to claim that the same shall be distributed amongst them *pro rata*, as if the same had been levied under all the writs collectively, and without any distinction.⁵

An arrest not in execution, but merely to found or retain jurisdiction, gives no right of preference.⁶

CHAPTER XXXI.

LEGAL MORTGAGES.

MORTGAGES arising by mere force of law are called *legal* mortgages, because of their being due to the action of law, or *tacit*, because of their being supposed to arise out of a tacit agreement between the parties to the same. Under the common law the number of such mortgages was considerable, but the tendency of modern legislation has been opposed to them, and consequently several of them have been by Act of Parliament either altogether abolished or limited in their action.¹ In addition to this, it may be stated that the Courts will under no circumstances strain the law of tacit hypothecations any further than they are

⁵ *In re Wools*,—*Roesch & Bruce v. Thomson, Watson & Co.*, 3 Menzies, 114; *Table Bay Harbour Board v. Deputy Sheriff*, 14 S. C. 319; *Jamieson v. Kettles*, 3 E. D. C. 183; *Compagnie Française and others*

v. Kimberley Mining Board, 2 Cape L. J. 223; 3 H. C. 281; see also Voet, 20: 2: 32; Schorer, Note 254.

⁶ Voet, 20: 2: 32.

¹ Act 5, 1861.

absolutely obliged to, the spirit of the age being unfavourable to them.²

Whenever a question arises as to whether a person is entitled to a legal mortgage or not, it will have to be decided in the case of movables according to the law of the domicile of the debtor, but with respect to immovables according to the law of the place where the immovables are situate.³

Legal mortgages, like conventional, are divided into general and special.

The following persons are entitled to general legal mortgages:—

(1) The Government in security for taxes due and unpaid to it, and that whether such taxes are personal or real.⁴ Where the tax is a real one, it is clear that the Government has, in the first place, a right as against the property upon which the tax is due, and, if that property has been parted with by the insolvent owner, therefore it is equally clear that the Government still retains its right as against the general estate of the insolvent.⁵

This mortgage, when it is due for the arrears of rent, quitrent, or some other periodical payment issuing out of land, or for the arrears of any tax or other periodical payment of a like nature, is in no case claimable for any sum exceeding a sum equal to three whole years of such rent, tax, or other payment.⁶

As regards personal taxes, such as a poll tax, the

² Per *De Villiers*, C. J., in *Mostert's Trustees v. Mostert*, 4 S. C. 37.

³ Voet, 20: 2: 34.

⁴ *In re De Villiers*, 1 Menzies, 370; *Treasurer-General v. Bosman's Trustees*, 2 S. C. 262; V. D. K., Th. 419, 456, 466; V. L., vol. 2, p. 94.

⁵ *Treasurer-General v. Bosman's Trustees*, 2 S. C. 262; Voet, 20: 2: 8.

⁶ Act 5, 1861, sec. 2; *Colonial Government v. Fryer and Huysamen*, 4 S. C. 313.

Government has a preference over the goods of the taxpayer generally.⁷

The house duty due under Act 20, 1878, would seem to fall under the class of personal, and not of real taxes.⁸

Municipalities and Divisional Councils have no tacit hypothecation for rates due to them, unless such hypothecation has been specially conferred upon them by Act of Parliament;⁹ but Divisional Councils have a sort of lien for the "rates last due" upon land which the owner thereof has sold and wishes to transfer to the purchaser, inasmuch as they can with the assistance of the Registrar of Deeds prevent such transfer until the rates due by such owner have been paid.¹⁰

(2) The Government over all the property of the collectors and receivers of the revenue of the Colony in security for the due payment of the revenue collected or received by them,¹¹ and this hypothec is not impaired or prejudiced by the fact that Government has taken sureties from such collectors upon their entering upon their office.¹² Such hypothec has, however, been

⁷ *Treasurer-General v. Bosman's Trustees*, 2 S. C. 262; *In re De Villiers*, 1 Menzies, 370; Voet, 20 : 4 : 23.

⁸ *Hunter's Trustees v. Colonial Government*, 4 S. C. 448.

⁹ *Smuts v. Cathcart Divisional Council*, 13 S. C. 359; *Municipality of Green Point v. Powell's Trustees*, 2 Menzies, 380; *Krachmal's Trustees and Cape Town Town Council v. Epstein*, 17 S. C. 317; Act 26, 1893. secs. 102, 178; Act 28, 1897, secs. 3, 4, 10, 11.

¹⁰ Act 40, 1889, sec. 275; *Smuts v. Cathcart Divisional Council*, 13 S. C. 359.

¹¹ *In re Buissinne*,—*Van der Byl and Meyer v. Sequestrator and At-*

torney-General, 1 Menzies, 318; Placaat, July 22, 1749, sec. 26 (7 Groot Placaatboek, col. 1005); *Chase, N. O., v. Du Toit's Trustees*, 3 Searle, 78; *In re Armstrong*, 5 Searle, 201; *In re Woolff and Bartman*, 2 Menzies, 322; *In re Stoll*, 2 Menzies, 325; *In re Woeke*, 1 Menzies, 564; *In re Lolly*, 1 Menzies, 368; Voet, 20 : 1 : 2; 20 : 2 : 8; V. D. K., Th. 420; Schorer, Note 246; V. L., vol. 2, p. 94; V. D. L. 174.

¹² *In re Buissinne*,—*Van der Byl and Meyer v. Sequestrator and Attorney-General*, 1 Menzies, 318; *Chase v. Du Toit's Trustees*, 3 Searle, 78; *In re Buissinne*,—*Craeser v. Sequestrator and Attorney-General*, 1 Menzies, 330.

abolished as far as the estates of auctioneers and deputy postmasters are concerned,¹³ but not as regards clerks in the Post Office, who are receivers of the revenue, but not deputy postmasters.¹⁴

As regards fines and penalties imposed by the Court the Government has no preference, but ranks merely as a concurrent creditor.¹⁵

(3) A wife has, under certain circumstances, a legal mortgage over the estate of her husband in security of the goods brought into the marriage by her. This is only the case when the parties have been married by ante-nuptial contract, excluding community of property and of profit and loss, and whereby it is specially and expressly provided that the wife's property shall be secured to her.¹⁶ But where the marital authority has been excluded, and the wife retains the full administration of her own affairs, she cannot claim a legal mortgage for money lent by her to her husband.¹⁷

(4) Children have a legal mortgage over the property of a surviving parent in security of any inheritance coming to them out of the estate of the predeceased parent, and which has been under the administration and control of the survivor. This mortgage attaches even to the goods of a stepfather or a stepmother who is married to the surviving parent in community of property, by virtue of such community.¹⁸

In order to secure the interests of children who

¹³ Act 5, 1861, sec. 8, sub-sec. 1.

¹⁴ *In re Armstrong*, 5 Searle, 201.

¹⁵ Voet, 20: 2: 9.

¹⁶ Act 21, 1875, sec. 10; Voet, 20: 2: 20; 20: 4: 21; 23: 2: 63; V. D. L. 174. See also Book I., pp. 41 and 55.

¹⁷ *Ruperti's Trustee v. Ruperti*, 4

S. C. 22; *Mostert's Trustee v. Mostert*, 4 S. C. 35; V. L. vol. 2, p. 99.

¹⁸ Act 5, 1861, sec. 8, sub-sec. 3; *Hull v. McMaster and others*, 1 Roscoe, 401, and 5 Searle, 266; Voet, 20: 2: 23; V. L., vol. 2, p. 95; V. D. K., Th. 422, 461; C. 5: 9: 8: 5.

are minors by all possible means, it is now provided by statute that a widow or widower is not to be allowed to enter upon a second marriage until the paternal or maternal portions of the minor children of a former marriage have been paid over to the Master of the Supreme Court or secured by a general bond or deed of *kinderbewys*.¹⁹ Such deed of *kinderbewys*, however, will not have the effect of preserving the legal hypothec beyond the date which is allowed by Act 5, 1861, sec. 3, but will rank amongst other mortgages according to the general rules relating to the ranking of mortgages between themselves.²⁰ But until the period provided by sec. 3 of Act 5, 1861, has expired, the tacit hypothec will continue in force and the *kinderbewys* will rank as such tacit hypothec.²¹

(5) Minors have a tacit hypothec upon the estates of their guardians and curators,²² and so also have insane persons, persons adjudged prodigals, and interdicted persons, and generally all to whom curators have been appointed by the Court on account of age or some other defect of mind or body,²³ in security for the due administration of their property by such guardians or curators, and of any debts incurred by these persons to their wards in the course of their administration.

¹⁹ Publication, May 23, 1805, sec. 14; Ord. 105, 1833, secs. 22, 23; Act 12, 1856, sec. 1; Act 16, 1860, sec. 6; Act 9, 1882, sec. 6; *Van Schalkwyk v. Pienaar*, 15 S. C. 295.

²⁰ *Naudé v. Naudé's Trustee*, 2 Buch. 166.

²¹ See the distribution in *In re Kotze*,—*Low v. Trustees and Creditors of Kotze*, 2 Menzies, 67.

²² *Clarence's Trustees v. Clarence's*

Executors, 3 Searle, 130; *Brink's Trustee v. Van Reenen*, 5 Searle, 162; *Brink's Curator v. Brink's Trustee*, 5 Searle, 342–344; *Minors Botes v. Trustee of Meere*, 1 S. C. 28; Act 5, 1861, sec. 3; Voet, 20: 2: 11, 17; 23: 2: 63; 27: 10: 1; V. L., vol. 2, p. 95; V. D. L. 174.

²³ Act 5, 1861, sec. 3; Voet, 20: 2: 13; V. D. K., Th. 421.

As regards minors, it makes no difference whether the minors are domiciled in the Colony or elsewhere, provided, at any rate, that they are minors both by the law of the Colony and of their place of domicile.²⁴

Guardians who have not taken out letters of confirmation are merely pro-tutors, and consequently the tacit hypothec of minors will not attach to their estates.²⁵ This tacit hypothec also does not attach to the estates of tutors who have been substituted or assumed, or who have been appointed by order of the Court, with the exception amongst substituted tutors, however, of the case of a stepfather, to whom a surviving mother has been married in community of property and whom she has substituted as tutor in her place instead of getting another tutor appointed, over whose estate the minors still have a tacit hypothec,²⁶ and that for the whole period of the mother's administration of their property, and not merely since the date of her second marriage.²⁷ Neither does it any longer exist with respect to the estates of pro-tutors, agents, or others (not being guardians) who have intermeddled with the property or affairs of minors,²⁸ nor to the estates of executors in security against losses occasioned by them in their capacity as executors,²⁹ nor to the estates of those with whom minors or other wards have contracted,³⁰ nor to the estates of trustees under an antenuptial contract.³¹

The hypothec is only available in security of what

²⁴ *In re Sandenbergh*,—*Matthyssen and others v. Trustees of Sandenbergh*, 2 Menzies, 353.

²⁵ *Redelinghuis v. Watermeyer*, N. O., 3 Buch. 57; *Barry's Trustee v. Hodgson*, 3 S. C. 249; Act 5, 1861, sec. 8, sub-sec. 3.

²⁶ Act 5, 1861, sec. 8, sub-sec. 3.

²⁷ Voet, 20: 2: 11; V. D. K., Th. 422; V. L., vol. 2, p. 95.

²⁸ Act 5, 1861, sec. 8, sub-sec. 3.

²⁹ *In re Minnaar*,—*Minnaar's Creditors v. Executor and Guardian of Neethling*, 3 Menzies, 71.

³⁰ Voet, 20: 2: 14.

³¹ *In re Wright*, 1 Menzies, 166.

actually falls under the guardianship, and not also in security of property to which other special guardians have been appointed, even though it may have found its way into the hands of the guardian whose estate is in question.³² Where there are two guardians, of whom one is the administering guardian, the minor will not be entitled to the tutorial hypothec over the estate of the dormant guardian until the estate of the administering guardian has been excussed, and then only for the balance not recovered by such excussion.³³

(6) In addition to the above, the text-writers lay it down that legatees and fideicommissaries are entitled to a legal mortgage in security of their legacies or inheritances, but it may be doubted whether this can at the present day be regarded as a correct mode of speech, when what is really meant is merely that such legatees and fideicommissaries, after all the creditors of the testator have been paid, shall be preferred, as regards the net balance of the testator's estate, to the creditors of the fiduciary or person who is burdened with the *fideicommissum* or duty of paying the legacies or of handing over the inheritance. The term "legal mortgage" would certainly have been more correctly used if it was intended to convey that it gave the legatees and fideicommissaries a preference either on the testator's estate over the creditors of such testator or on the estate of the fiduciary over the creditors of such fiduciary. Neither of these, however, is the case, for on the one hand the debts and liabilities of the testator have to be paid and settled before there can be any question of legacies or *fideicommissum*, and

³² *In re Lutgens*,—*Neethling, q.q.*,
v. *Trustees and Creditors of Lutgens*,
2 Menzies, 312.

³³ *In re Liesching*,—*Agents of Von*

*Bihl v. President and Directors of
the Lombard Bank and others*, 2
Menzies, 329.

on the other the legatees and fideicommissaries have no claim whatever at the present day upon the estate of the heir or fiduciary. What is really meant is that if, after the debts and liabilities of the testator have been satisfied, there is a net balance of his estate left over, and any property forming part of such balance is found actually existing *in specie* in the hands of the fiduciary, the legatees and fideicommissaries will have a preference as regards such property over the creditors of the fiduciary.³⁴ This preference only attaches to such specific property belonging to the testator, and not being the subject-matter of the bequest or *fideicommissum*, as comes into and is found *in specie* in the possession of the heir or fiduciary,³⁵ the burthen of proving that any property, over which this so-called hypothec is claimed, did belong to the testator being upon the person making the claim.³⁶ The hypothec, therefore, will not attach to money or to any other property belonging to the testator which has become so mixed with that of the heir or fiduciary that it cannot be distinguished or separated from it, with respect to which the legatees or fideicommissaries will have merely a concurrent claim against the fiduciary's estate.³⁷ With respect to the property which is the subject-matter of the bequest or *fideicommissum* the hypothec does not apply, nor is it necessary,

³⁴ *Hiddingh v. Roubaix*, 8 Buch. 36, and 1 Roscoe, 13; *Gnade v. Executors of Piton and others*, 2 Menzies, 428; *Booyesen and another v. Colonial Orphan Chamber and Trust Co. and others*, Foord, 48; Voet, 20: 2: 21; 30: 40: 41; V. L., vol. 2, p. 101.

³⁵ *Oosthuysen's Tutrix v. Moffat and another*, 5 S. C. 319; *In re Lutgens*,—*Neethling, q.q.*, v. *Trustees and Creditors of Lutgens*, 2 Menzies,

312; *Hiddingh v. Roubaix*, 8 Buch. 36, and 1 Roscoe, 13; *Jennings v. Van Wyk*, 7 S. C. 228; Voet, 30: 41.

³⁶ *In re Lutgens*,—*Neethling, q.q.*, v. *Trustees and Creditors of Lutgens*, 2 Menzies, 312.

³⁷ *Oosthuysen's Tutrix v. Moffat and another*, 5 S. C. 319; *Brink's Curator v. Brink's Trustee*, 5 Searle, 339-340; Voet, 42: 6: 4; 4 Holi. Cons., c. 266.

inasmuch as the legatee or fideicommissary would as a general rule be entitled to recover it by a real action or *vindicatio rei*.³⁸

Where two spouses have in a mutual will made a bequest of specific property belonging to the joint estate to the survivor, subject to a *fideicommissum* in favour of the children of the marriage, the tacit hypothec to which the latter will be entitled as fideicommissaries, will attach only to the half-share of such property which belonged to the first-dying.³⁹ Any claim which they may have against the survivor's half-share will during his or her lifetime only be concurrent.⁴⁰

Passing on to special legal mortgages, one of the most important of these is that of persons who are in actual possession of movable or immovable property belonging to another, with respect to which they have incurred expense or upon which they have expended labour, either in terms of a contract between them and the owners of the property or otherwise. Such persons are entitled to the right of retaining the property until they have been refunded the money expended by them or the value of their labour.⁴¹ Thus the builder of a house or ship may legally retain such house or ship, of which he is still in actual possession, until he has been paid for the labour and material expended by him thereon, and this lien of his will be preferred even to a special conventional mortgage of the land upon which the house is built; ⁴² but this right

³⁸ *Brink's Curator v. Brink's Trustee*, 5 Searle, 341.

³⁹ *Oosthuysen's Tutrix v. Moffat and another*, 5 S. C. 319; *Van Rooyen v. McColl and others*, 3 Searle, 284.

⁴⁰ *Hiddingh v. Roubaix*, 8 Buch. 36.

⁴¹ Voet, 20: 2: 28; 20: 4: 19;

16: 2: 20; Schorer, Note 254; V. L., vol. 2, p. 330.

⁴² *Brown's Assignees v. Pote*, 4 E. D. C. 50; *Shepherd v. McLagan*, 2 Off. Rep. 92; *Sterner v. Morom*, 20 S. C. 499; Act 5, 1861, sec. 8, subsec. 5; Voet, 20: 1: 4; 19: 2: 40; V. L., vol. 2, p. 330.

of retention will not hold against the owner of landed property for money due under a building contract entered into by a lessee whose lease has terminated.⁴³ Whether this right of retention will hold good against the Crown is doubtful.⁴⁴ It will not, however, hold good in favour of sub-contractors who have been employed by the original contractor without the knowledge or consent of the owner, between whom and them there is no privity of contract, they looking for payment to the original contractor and not to the owner;⁴⁵ nor will it hold good against the owner where the contractor was employed by a lessee and not by the owner.⁴⁶

The right of retention also belongs to the *bonâ-fide* possessors of land not belonging to them, for the compensation to which they are entitled for improvements made by them upon the land, at any rate to the extent to which such land has been enhanced in value thereby.⁴⁷ A *malâ-fide* possessor would appear to have the same right, if the owner of the land has stood by whilst the improvements were being made without interfering or giving notice of his rights, but not where this has not been the case, for in this latter case the possessor is only entitled to compensation for necessary expenses incurred for the protection or preservation of the land, which he can only recover after having first restored the land to the owner.⁴⁸

Lessees of land are with us in a different position

⁴³ *Gillingham v. Harris & Morgan*, (1905) T. S. 94.

⁴⁴ *Colonial Government v. Smith, Lawrance & Mould*, 4 S. C. 199.

⁴⁵ *Ibid.*

⁴⁶ *Gillingham v. Harris & Morgan*, (1905) T. S. 94.

⁴⁷ *De Beer's Consolidated Mines v. London and South African Explora-*

tion Co., 10 S. C. 359; *Bellinghan v. Blommetje*, 4 Buch. 36; *Parkin v. Parkin*, 2 Buch. 136; *Barnard v. Colonial Government*, 5 S. C. 124.

⁴⁸ *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

from other possessors, the law with respect to them having been laid down by the Placaat of September 26, 1658, sections 10 and 11. These are only entitled to compensation for improvements made by them with the consent of the lessor, and then only for the bare value of the materials used, and not for the amount to which the land may have been enhanced in value,⁴⁹ and for such compensation they are not entitled to retain possession of the land, but only to a tacit hypothec on the land after giving up possession.⁵⁰ Lessees who have made improvements without the consent of the owner are not entitled to compensation, except for necessary expenses, and for these their only remedy is by way of action after having given up possession of the land. As regards useful expenses, whereby the value of the land has been increased, their only remedy is to remove the materials used by them in the improvements before the expiration of the lease, wherever this can be done without any serious injury to the land, and saving to the lessor his landlord's lien upon such materials for any rent which may be due to him at the date of the removal,⁵¹ of which we shall treat further on.

Amongst instances of movable property which is subject to the right of retention may be mentioned the case of an agent for the landing and sale of goods, who will be entitled to a lien upon goods in his possession or upon the proceeds of the same for the amount of the reasonable expenses incurred by him in the landing

⁴⁹ Placaat, Sept. 26, 1658, sec. 11.

⁵⁰ Placaat, Sept. 26, 1658, secs. 10, 11; *Barnard v. Colonial Government*, 5 S. C. 124; *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359.

⁵¹ *Barnard v. Colonial Government*, 5 S. C. 124; *De Beer's Consolidated Mines v. London and South African Exploration Co.*, 10 S. C. 359; *Trustees of Lyons v. Exploration Co.*, 6 H. C. 216.

and sale of such goods, and who will have the right to retain such goods until his expenses have been paid.⁵²

Shipmasters and carriers also have a right of retention for their freight and warehousing and other expenses incurred by them with respect to the goods carried by them; and so also have innkeepers with respect to the goods of their lodgers.⁵³

The Harbour Boards of Table Bay, Port Elizabeth, and East London have a statutory lien upon all vessels lying within their harbours in security for all dock and harbour dues, duties and charges which may be due to them in respect of such vessels, which lien they may enforce through the Collector or Sub-Collector or other principal officer of Customs who has the power of refusing clearance to the master of any ship until all harbour dues have been paid.⁵⁴

An attorney or conveyancer also has a lien upon documents in his possession for the costs of professional services rendered by him or expenses incurred by him upon or with respect to such documents, but not for other professional services unconnected with such documents.⁵⁵ Thus, where an attorney and conveyancer, employed to pass a transfer of land, was compelled, in order to pass such deed, to incur expense in obtaining the original title-deed and in executing and registering intermediate transfers between the original grant and the transfer which he was employed to pass, it was held that he was entitled to a lien upon such transfer for all the expenses which were absolutely necessary for the purpose of passing such transfer.⁵⁶

⁵² *Walker v. Durrant and Co. and another*, 2 S. C. 361.

⁵³ *V. L.*, vol. 2, p. 330.

⁵⁴ Act 36, 1896, sec. 84; *Table Bay Harbour Board v. Deputy Sheriff*, 14 S. C. 319.

⁵⁵ *Trustees of Tritsch v. Berrangé & Son*, 3 S. C. 217; *V. L.*, vol. 2, p. 331.

⁵⁶ *Queenstown Assurance Co. v. Wood's Trustee and others*, 5 S. C. 327.

But where title-deeds were intrusted to an attorney for the purpose of passing a mortgage bond, he will have no lien upon such deeds for his charges for preparing the bond, though he will upon the bond itself, which has been passed through his instrumentality.⁵⁷

Whether an attorney has, by the law of Cape Colony, a lien for his costs upon the amount of a judgment obtained by him in favour of his client has not yet been decided, though there has been an *obiter dictum* in one case in affirmation of such lien. One thing, however, is clear, that he can have no lien upon the amount of a judgment which has not been paid over to him by the unsuccessful party and which he has therefore not in possession,^{57a} nor has he such lien for costs due to him for other work done by him for his client unconnected with the particular action in which the judgment was recovered.⁵⁸

A person, again, who has a policy of life insurance in his possession, upon which he has been obliged to pay the premiums to keep the same alive, is entitled to retain the policy until the money paid by him has been refunded.⁵⁹ On the other hand, a professional accountant to whom an insolvent before his insolvency has intrusted the books of his business for the purpose of making up a statement of his affairs has no lien upon such books for the value of his work and labour in making up the statement. His lien, if any, would, in accordance with the rule that a workman has a lien upon the goods or things upon which he has expended

⁵⁷ *Hudson's Trustee v. Wiley*, 4 E. D. C. 299. See also *Jewell & Rutter v. Hazell & Steer*, 14 S. C. 16; *Trustees of Allen, Birkett & Co. v. Shepstone*, 1 Cape L. J. 291.

^{57a} *Lawson v. Stevens*, (1906) T. S. 481.

⁵⁸ *Thomas v. Barker*, 2 Menzies, 321; *Trustee of Murtha v. Coghlan*, 1 H. C. 511; *Arend v. Hendrickse*, 3 Menzies, 119.

⁵⁹ *Thorpe's Executor v. Thorpe's Tutor*, 4 S. C. 488.

his work and labour, attach to the statement made up by him, and not to the books.⁶⁰

The right of retention of movables is lost by the person entitled to it giving up possession of the same to the owner.⁶¹

The lessors of immovable property, whether the same be urban or rural, have a special legal mortgage or landlord's lien, as it is usually called, upon *investa et illata*, that is, upon movables brought into or upon the leased premises, in security of rent due,⁶² but such mortgage is not claimable for any sum greater than one whole year's rent or hire.⁶³ In the case of a rural tenement the fruits growing on the land, and even those which have been already reaped and are lying in ricks upon the ground or have been carried into barns, are also subject to the same lien.⁶⁴

This lien, according to Voet,⁶⁵ has its origin not so much in the law as in a sort of tacit agreement or understanding which is involved in the very nature of the contract of letting and hiring. It will therefore belong to any one who stands in the position of landlord to the person over whose property the lien is claimed. Thus it has been decided that a boarding-house keeper who includes in his charge for board and lodging a charge for the custody of the lodger's luggage is entitled to a lien on such luggage;⁶⁶ but

⁶⁰ *Trustee of Walker v. Jones, Cosnett and Ball*, 2 S. C. 354; *Spangenberg's Trustee v. Cousins*, 2 Menzies, 343.

⁶¹ *Ex parte Levin and others*, 21 S. C. 453.

⁶² *Lazarus v. Dose*, 3 S. C. 42; Voet, 20: 2: 2-4; G. 2: 48: 17; V. D. K., Th. 423; Schorer, Notes 248, 249; V. L., vol. 2, p. 96; V. D. L. 174. This is by virtue of a tacit

agreement to that effect (Voet, 2: 14: 15).

⁶³ Act 5, 1861, sec. 5; *Dommissie v. Theart*, 4 S. C. 92; *Richards v. Clarke*, 3 E. D. C. 93.

⁶⁴ Voet, 20: 2: 2-4; G. 2: 48: 17; V. D. K., Th. 423; V. L., vol. 2, p. 96; V. D. L. 174.

⁶⁵ Voet, 20: 2: 2.

⁶⁶ *Sullivan v. Sutton*, 13 S. C. 465.

that an agistor, or person who takes on cattle for the purpose of being grazed and taken care of, is not entitled to a lien for the money due to him for such agistment.⁶⁷ Nor has the owner of land any lien upon goods brought on to his ground by trespassers.⁶⁸

The landlord's lien does not hold in security for repairs effected by him and which it was the duty of the tenant to have done.⁶⁹

The *invecta et illata* need not necessarily be the property of the tenant, for even the property of a third party brought on to the leased premises may be liable to the legal hypothec or lien, and will be so liable whenever they have been brought there with the consent of their owner and with the object of their remaining there not for a temporary purpose, but permanently or at any rate for the period of the lease, or indefinitely,⁷⁰ the owner being presumed to have by his conduct tacitly agreed to his property becoming subject to the lien *in subsidium* of the tenant's own property.⁷¹ His consent to such lien will be presumed from his conduct in leaving his goods in the possession of the tenant under such circumstances as would necessarily lead the landlord to believe that the goods belonged to the tenant,⁷² but not where the circumstances do not necessarily lead to such belief.⁷³ Hence it has been held that the lien does not attach to a piano

⁶⁷ *Momsen v. Mostert*, 1 S. C. 185.

⁶⁸ *London and South African Exploration Co. v. Abrahams and others*, 2 Cape L. J. 222.

⁶⁹ *Woodrow & Co. v. Rothman*, 4 E. D. C. 9.

⁷⁰ *Longlands v. Francken*, Kotze, 256; *Turpin v. Wagstaff & Sons*, 24 S. C. 597.

⁷¹ Voet, 20 : 2 : 5; *Noble v. Heatley*, (1905) T. S. 433; *Standard and Digger's News Company v. Esterhuizen*, Hertzog, p. 22.

⁷² *Ulrich v. Ulrich's Trustee*, 2 S. C. 319.

⁷³ *Lazarus v. Dose*, 3 S. C. 42; *Heugh's Trustee v. Heydenrich*, 12 S. C. 318; *Scheepers v. Vigors, N.O., and another*, 6 Buch. 201.

let to the tenant by a third party, and upon which the name of the owner was distinctly engraved,⁷⁴ but that it did attach to a piano belonging to a daughter who was living in the leased premises with her mother, the tenant, without paying anything for her board and lodging, but in lieu of such payment assisting the mother in the housekeeping.⁷⁵ The same was also in the Transvaal High Court decided to be the case with respect to a piano let to the lessee under the hire-purchase system,⁷⁶ but that the effect of the legal hypothec may be avoided by the owner of the piano giving notice of his ownership to the landlord.⁷⁷

In accordance with the above rule, it has also been decided that the landlord's lien attaches upon the separate property of a wife married by antenuptial contract, who had hired a house in her husband's name and then brought her separate property into the hired premises, without giving the landlord notice that she was married by antenuptial contract and that the property brought in was hers.⁷⁸

The more prudent course for a person who allows his movables to be taken on to leased premises, either under a contract of hiring to the tenant or otherwise, is to give notice to the landlord that the property belongs to him and not to the tenant.⁷⁹

Even the goods of a sub-lessee brought upon the premises will be liable to the lien, and that not only to his own immediate lessor but to the original lessor; but in the latter case only to the extent of his own

⁷⁴ *Lazarus v. Dose*, 3 S. C. 42.

⁷⁵ *Ulrich v. Ulrich's Trustee*, 2 S. C. 319.

⁷⁶ *Standard and Digger's News Printing and Publishing Co. v. Esterhuizen*, 10 Cape L. J. 236; *Hertzog*, p. 22.

⁷⁷ *Mackay Brothers v. Cohen*, 1 Off. Rapp. 445.

⁷⁸ *Crowley v. Domony*, 2 Buch. 205.

⁷⁹ *Heugh's Trustee v. Heydenrich*, 12 S. C. 318; *Mackay Brothers v. Cohen*, 1 Off. Rep. 342; *Bapoo v. Mahomed*, 21 S. C. 147.

indebtedness to his immediate lessor.⁸⁰ The same rule also applies to the produce of the ground which belongs to the sub-tenant; but in this case, according to Voet,⁸¹ such produce is liable for the whole of the rent due to the original lessor, and not merely for the rent due by the sub-lessee to his immediate lessor, though Matthaeus is of a different opinion.⁸²

Things which are lent to a lessee merely for a temporary purpose are not subject to the landlord's lien, nor are things deposited with or pledged to the lessee, much less are things which have been left with a tradesman in the course of his trade, such as cloth left with a tailor for the purpose of being worked up, or goods left with an auctioneer for purposes of public sale.⁸³

Seamen have a maritime lien in security of their wages on the ship and on any freight which may be due for any voyage during which they may have been serving;⁸⁴ and so also has the master of a ship for his wages and disbursements. Salvors also have a maritime lien for their salvage remuneration on the property salvaged; and the owner of a ship damaged by collision has a maritime lien for the damage caused over the ship causing the damage and its freight. All questions arising out of these matters will have to be decided in the Cape Colony according to the maritime law of England,⁸⁵ to which, as falling outside the scope of this work, the reader is referred.

⁸⁰ *Smith v. Dierks*, 3 S. C. 142; *Friedlander v. Croxford and Rhodes*, 5 Searle, 395; Voet, 20: 2: 6.

⁸¹ Voet, 20: 2: 7.

⁸² Matthaeus, *De Auctionibus*, 1: 19: 54; *Smith v. Dierks*, 3 S. C. 142.

⁸³ *Henderson v. Waldron & Co.*, 2 Cape L. J. 168; Voet, 20: 2: 5.

⁸⁴ For Cape Colonial decisions see

Singlton, in the matter of the Black Swan, *Ex parte Smith*, 2 Menzies, 350; *Denysen, N. O., v. McFie*, 3 Searle, 334. For the Roman-Dutch authorities see G. 2: 48: 19, 20; Schorer, Note 253; V. L., vol. 2, p. 98; V. D. L. 175.

⁸⁵ Act 8, 1879, sec. 1.

In Holland, a tacit hypothecation was by special statute allowed to bleachers over linen left with them to bleach, and that not only for what was due to them for bleaching that particular linen, but also for outstanding accounts for bleaching done upon other linen which had already been returned to the owner;⁸⁶ but this has never obtained in the Cape Colony.

The following legal mortgages, which formerly were recognized by the law of the Cape Colony, have been abolished by Act 5, 1861 :—

(1) The legal mortgage of Government upon the estates of auctioneers and deputy postmasters in their capacity as collectors or receivers of the revenue.⁸⁷

(2) The legal hypothec of Government upon the estates of persons with whom it has contracted.⁸⁸

(3) The tacit hypothecation possessed by Municipalities, Churches, and generally all public bodies and institutions upon the estates of persons intrusted with the collection, custody, or administration of their revenues, in security for the revenues not accounted for by such persons.⁸⁹

(4) The tacit hypothecation which domestic servants, who were in the service of a master at the time of his death or insolvency, formerly had for the wages due to them.⁹⁰

(5) The legal hypothec of minors over the estates of pro-tutors and upon the estates of agents or others

⁸⁶ Voet, 20: 2: 31; V. D. K., Th. 424, 449; V. D. L. 175.

⁸⁷ Act 5, 1861, sec. 8, sub-sec. 1. *In re Wolff & Bartman*, 2 Menzies, 322; *In re Armstrong*, 5 Searle, 201.

⁸⁸ Act 5, 1861, sec. 8, sub-sec. 2; Voet, 20: 2: 8; 20: 4: 24, 25; G. 2: 48: 15; V. D. K., Th. 420.

⁸⁹ Act 5, 1861, sec. 8, sub-sec. 4; Voet, 20: 2: 25; G. 2: 48: 18;

Schorer, Note 251; V. D. K., Th. 425, 456; V. D. L. 175.

⁹⁰ Act 5, 1861, sec. 8, sub-sec. 7; *Mulder v. Creditors of Lacable*, 2 Menzies, 348; *Kilgour v. Creditors of Lisbon-Berlin T. Goldfields*, 2 S. Af. Rep. 86; Voet, 20: 4: 37; Schorer, Note 245; V. D. K., Th. 484; V. L., vol. 2, p. 113; V. D. L., 178.

(not being their guardians) intermeddling with the property or affairs of such minors,⁹¹ and upon the estates of tutors who have been substituted, assumed, or surrogated, or who have been appointed by order of Court, in security for the debts due and owing by such persons in such capacities to such minors.⁹² Guardians who have not taken out letters of confirmation are merely pro-tutors, and consequently minors will have no tacit hypothec over their estates.⁹³

(6) The tacit hypothecation of persons by whom ships or houses have been built or repaired for the costs and charges thereby incurred,⁹⁴ unless they are in actual possession of such ships or houses, in which case they have a lien or right of retention as shown above.⁹⁵

(7) The tacit hypothecation of persons who have lent money for the purpose of being expended in the repair of houses or ships or other property, in security of the money so lent.⁹⁶

(8) The tacit hypothec of persons supplying ships owned by persons resident in the Cape Colony with tackle, apparel, furniture, or stores.⁹⁷

⁹¹ *In re Hoffman*, 1 Menzies, 534; *Trustees of Clarence v. Executors of Clarence*, 3 Searle, 130; *Brink's Trustee v. Van Reenen*, 5 Searle, 162; Voet, 20: 2: 12; Schorer, Note 247.

⁹² Act 5, 1861, sec. 8, sub-sec. 3.

⁹³ *Redelinghuis v. Watermeyer*, N. O., 3 Buch. 57; *Barry's Trustee v. Hodgson*, 3 S. C. 249.

⁹⁴ Act 5, 1861, sec. 8, sub-sec. 5; *Shepherd v. McLagan*, 2 Off. Rep. 92; Voet, 20: 2: 28, 29; 20: 4: 19; G. 2: 48: 13; V. D. K., Th. 417; Schorer, Note 244; V. D. L. 174.

⁹⁵ See p. 260, above.

⁹⁶ Act 5, 1861, sec. 8, sub-sec. 6; *The Master v. Churchwardens of the Roman Catholic Chapel and others*, 2 Menzies, 325; *Norden v. Solomon*, q.q., 2 Menzies, 377; Voet, 20: 1: 2; 20: 2: 28, 29; 20: 4: 20; V. L., vol. 2, p. 91.

⁹⁷ Act 5, 1861, sec. 8, sub-sec. 8; *Norden v. Solomon*, q.q., 2 Menzies, 397; *Neid and others v. Crozier and others*,—Reports of the *Commercial Advertiser* for 1855, p. 74.

CHAPTER XXXII.

THE CONSEQUENCES OR EFFECT OF MORTGAGE.

WHEN we come to the consequences or legal effect of mortgage the classification or division of mortgages which has been given above is of but little practical value, inasmuch as the classification which is most convenient with reference to origin does not coincide with that which would be required where the consequences of mortgage are in question. For this latter purpose it is more convenient to consider mortgages as being represented by four main types, to which all mortgages assimilate themselves in greater or less degree. These types are (1) pledge, (2) the special conventional hypothec on immovable property, (3) general legal hypothecs, and (4) general conventional hypothecs.

Mortgage, in its most complete form, is a real charge upon the property mortgaged and upon the entire *dominium* of such property, causing, or rather being in itself, a deduction from and a diminution of the rights of ownership therein. It also gives the mortgagee or person entitled thereto the actual possession of the property mortgaged, with the right of retaining the same until the debt or other obligation due to him has been satisfied. Such actual physical possession will enable him to prevent the owner from dealing with the property until such debt or obligation has been paid or satisfied, and he will be entitled to defend such possession by legal process.¹ In this complete form mortgage is to be found in the case

¹ *Brown v. The Messenger of R. M. Court, Queenstown*, 6 Buch. 49.

of the pledge of movables by delivery and in every case in which a person has a lien or right of retention of property, whenever such property is movable. Where the property held under such right of retention is immovable, the control of the holder over the property is not so complete as in the case of movables, inasmuch as the owner may, without his knowledge or consent, transfer the ownership of such property to a third party. In practice, however, the effect will be the same, since the right of retention will hold good even against the new owner, and the security will therefore remain unimpaired.

In all these cases the person who has the possession or right of retention is liable to the reciprocal duty of taking care of the property, and, where the property is destroyed whilst in his possession, the burden of proof will be upon him to show that the loss resulted from no negligence on his part.² A pledgee will also be entitled to be reimbursed the necessary expenses incurred by him in the preservation of the property pledged, and will have a right of retention in security of such expenses both against the pledgor and his creditors.³

The rights of mortgage exist in a somewhat less complete form in the case of a judicial mortgage or *pignus prætorium* than in the above cases. Still the *pignus prætorium* is in many respects almost equivalent to a pledge of movables perfected by delivery.⁴ Thus

² *Lourens v. Du Toit*, 8 Buch. 182.

³ *Smith v. Farrelly's Trustee*, (1904) T. S. 949.

⁴ *In re Woeke*,—*Cloete v. The Colonial Government*, 1 Menzies, 554; *In re Lond*,—*Blanckenberg v. Guardian of Lond*, 1 Menzies, 483; *Mangold*

Brothers v. Eskell, 3 S. C. 48; *Kearns v. Cole*, 10 S. C. 63; *Diering v. Furney and others*, 1 H. C. 112; *Reed v. Lee*, Kotze, 130; *Keet v. Zeiler*, 1 S. Af. Rep. 18; *Meyer v. Botha & Hergenröder*, 1 S. Af. Rep. 47; *Keet v. Dell*, 1 S. Af. Rep. 109; *Moller v. Natal Bank*, 1 Off. Rep.

the judgment creditor will be able, by means of his possession of the property through the Sheriff, to prevent the owner from dealing with the same just as a pledgee would, but with this difference, that the Sheriff is not entitled to remain in possession indefinitely, but must proceed with the realization of the property according to law. Nor has the judgment creditor the same absolute and complete rights of preference as the pledgee has. For instance, he may in terms of Ordinance 3 of 1844 have to share his preference with other judgment creditors;⁵ and in case the debtor becomes insolvent before the goods taken in execution have been sold or before the proceeds realized from the sale thereof have been paid over by the Sheriff to the creditor, the latter will lose his preference except as regards the costs of execution, and the property attached or its proceeds will have to be administered with the rest of the insolvent estate.⁶

A judicial mortgage does not lapse by the failure of the Sheriff to sell the property attached before the return day of the writ or by his omission to make a return, though he may possibly, before selling the property after the return day, have to apply to the Court for an extension of the writ.⁷

In the case of an attachment of immovable property the mortgage is not so exclusive as in the case of a pledge, for the sale in execution will in such a case be subject to all previously existing mortgages, and the judicial mortgage is therefore more of the nature of a special bond on immovable property which takes rank with other special bonds according to date.

78; *Natal Bank v. Martinis & Co.*, 2 Off. Rep. 132; *Quin v. Mego*, 2 Off. Rep. 141.

⁵ See p. 251, above.

⁶ Ord. 6, 1843, sec. 22; *Mangold Brothers v. Eskell*, 3 S. C. 50.

⁷ *Cholwich v. Penny*, 5 E. D. C. 270.

The tacit hypothec or lien, which a landlord has over *illata et invecta* or movables brought into the leased premises and over the produce of the land, is inferior to the *pignus prætorium* in possessory rights, inasmuch as the possession of the land, and therefore of the *illata et invecta*, is not in the landlord, but in the tenant, and the landlord cannot therefore of his own motion prevent the tenant from alienating the property which is subject to the lien or from removing it from the premises,⁸ but can only do so with the assistance of the Court, that is, by obtaining an order of Court for the attachment of such property in enforcement of his landlord's lien, or otherwise interdicting the tenant from dealing with the same or removing it from the land.⁹ It is, however, superior to the *pignus prætorium* as a right of preference, inasmuch as it need in no case be shared with anybody and is not defeated by the insolvency of the debtor or tenant. It takes effect *ipso jure* immediately movables are brought into or upon the leased premises, and will continue in force as long as these remain there, the judicial attachment or interdict not being essential to give it effect, but being merely required to prevent its being defeated by the removal of the goods from the premises.¹⁰ It follows that where *illata et invecta* are actually found on the leased premises upon the insolvency of the tenant, the lessor will be entitled to a preference upon the proceeds of such sale for the rent due to him, even though no order of attachment may have been obtained.¹¹ It will also take precedence of a *pignus*

⁸ *Sullivan v. Sutton*, 13 S. C. 463; *Reed v. Buckley*, 7 E. D. C. 12.

⁹ Voet, 20: 2: 2, 3; Groen., De Leg., D. 20: 2: 9; V. D. K., Th. 423; G. 2: 48: 17; *Pinn v. Elliott*,

21 S. C. 366; *Ex parte Lewis & Marks*, (1904) T. S. 281.

¹⁰ V. D. K., Th. 423, 453.

¹¹ *In re Stilwell*,—*Scheuble and Van den Burg v. Durham*, 1 Menzies,

prætorium established by a writ of execution issued before the landlord has obtained an attachment or interdict in enforcement of his lien,¹² provided the goods have not been removed from the leased premises by the Sheriff.¹³

The order of attachment or interdict above referred to will be granted whenever the landlord has reasonable grounds for apprehending that the tenant is intending to remove the goods from the premises, and the Court will not insist upon the very strictest proof of the tenant's intention.¹⁴ An attachment will not, however, be granted after the goods have been removed from the premises,¹⁵ but where it has once been granted it may be put into execution, not only whilst the property is still on the ground, but also when it is in the act of being removed or has even been already removed into other premises, in which latter case the Court will order the property to be returned to the premises from which it has been removed.¹⁶ But the landlord will have to act with vigilance in following up the goods, otherwise he will lose his legal hypothec and right of preference.¹⁷

In the case of a special bond on immovable property the mortgagee is not in possession of the property, but, by reason of the fact that the mortgage is registered against the title-deeds of the property in the office of the Registrar of Deeds, and that

537; *Fryer v. Farquhar's Trustee*, 9 Buch. 226; *Goodall v. Flower*, 1 S. C. 143; Voet, 20: 2: 2.

¹² *In re Stilwell*,—*Scheuble and Van den Burg v. Durham*, 1 Menzies, 537; *Dommissie v. Theart*, 4 S. C. 92.

¹³ *Alexander v. Burger*, (1905) T. S. 80.

¹⁴ *Greef v. Pretorius*, 12 S. C. 104. But see *London and South African Exploration Co. v. Mylchreest*, 4

Cape L. J. 133, 232.

¹⁵ *In re Price*, 3 S. C. 139. But see *Badcock & Co. v. Skeen's Assignees*, 1 Cape L. J. 238, with footnote thereon; *Busting v. Kinnear*, 5 H. C. 254; G. 2: 48: 17; Schorer, Note 250; V. L., vol. 2, p. 96.

¹⁶ *Board of Executors v. Stigling*, 1 Buch. 25.

¹⁷ *Hall v. Welkom and others*, 2 Cape L. J. 166; 6 N. L. R. 73.

nothing can be done by the owner with the property which in any way detracts from the *dominium* thereof, except by means of registration in the same office, he will, at any rate, be in the position to prevent the alienation of the property or any alienation of or interference with the *dominium* thereof. In fact, it will be the duty of the Registrar to decline to register anything that can in any way amount to an interference with the *dominium*, and where he fails to do so the mortgagee may apply to the Court for redress. Thus, where a mortgagor had imposed a servitude on the land mortgaged which the Registrar had allowed to be registered, it was decided by the Court that it was not necessary for the mortgagee to prove actual pecuniary damage; that the mere interference with the *dominium* of the land by imposing the servitude was a prejudice to the mortgagee's legal rights, which entitled him to have the servitude set aside.¹⁸ It is different where the interference with the property does not *per se* amount to an actual diminution of the *dominium* thereof, for in that case it will be necessary to show that the value of the property and consequently of the security has by such interference been reduced below the amount of the debt secured. Consequently a mortgagee cannot object to a lease of the mortgaged property to a third party. All that he can claim is that if the property, when it comes to be realized to pay the amount due to him, does not, when sold burdened with the lease, realize the amount of his security, then it shall be sold free from the lease.¹⁹ This is, indeed, the usual and

¹⁸ *Stewart's Trustees and Marnitz v. The Uniondale Municipality*, 7 S. C. 110.

¹⁹ *Haupt's Trustee v. Haupt & Co.*,

1 Searle, 287; *Cape Commercial Bank v. Fleischman and Van Rensburg*, Kotze, 1; *Reed's Trustee v. Reed*, 5 E. D. C. 23; *Albertyn and*

proper course in case of the insolvency of the mortgagee, namely, for the trustee first of all to offer the land for sale provisionally subject to the lease, and if the highest bid is not sufficient to cover the mortgage, then to sell the land free from the lease;²⁰ but whether this is the course which will have to be followed in every case, or whether the prejudice sustained by the mortgagee may be established in some other way and a remedy applied, has not yet been decided.²¹

In the same way a mortgagor is not entitled to pull down a mortgaged house or to alter the form of the mortgaged property, if such destruction or alteration will either reduce the value of the mortgagee's security or tend to the extinction of the mortgage altogether.²²

A general legal hypothec is in some respects equivalent in its effects to a special bond on immovable property, though, inasmuch as it is not registered in the Deeds Registry, it does not afford the mortgagee the same power of control over the owner in his dealing with the property subject to the hypothec. It would appear that under certain circumstances the person, who has the right to such a hypothec, would be entitled to apply for an interdict restraining the alienation of property which is subject to the hypothec;²³ and it has been decided that where the hypothec has been prejudiced by the subsequent imposition of a servitude or a conventional hypothec upon the property, the same course will have to be followed as in the case of a special

another v. Van der Westhuysen and others, 5 S. C. 385.

²⁰ *Dreyer's Trustee v. Lutley*, 3 S. C. 59.

²¹ *Reed's Trustee v. Reed*, 5 E. D. C.

23.

²² Voet, 20 : 6 : 14.

²³ *Per Watermeyer, J.*, in *Hull v. McMaster and others*, 5 Searle, 228, 229.

conventional mortgage. For instance, it has been decided that the tacit hypothec of Government for quitrent cannot be defeated by any mortgage of the quitrent land by the owner or his assigns, much less by the imposition of a servitude thereon; and that, if a servitude be imposed upon the land, and such land when afterwards put up for sale in execution of a judgment of the Government for quitrent, does not fetch sufficient when encumbered with the servitude, it will have to be sold without the servitude.²⁴ Under our common law such general hypothec continued in force as regards immovable property even after such property had passed into the hands of a third party, whether by an onerous or lucrative title, that is, whether for valuable consideration or not;²⁵ but by Act 5, 1861, sec. 9, it is provided that "no house, farm, or other fixed property shall, after transfer thereof to a purchaser who purchased the same by a true and *bonâ-fide* bargain for valuable consideration, be subject to any tacit hypothecation to which it might have been subject in the hands of some former owner of the said property." It follows that a general legal hypothec will only continue to attach to immovable property in the hands of a third party if such third party has acquired the same not for valuable consideration but gratuitously, or otherwise *malâ fide*, e.g., collusively or with notice of the existence of the tacit hypothec.²⁶ As regards movables, the tacit general hypothec is extinguished by the transfer of the ownership whether for valuable consideration or otherwise.²⁷ It must, however, be

²⁴ *Colonial Government v. Fryer and Huysamen*, 4 S. C. 313.

²⁵ Voet, 20 : 1 : 14.

²⁶ Act 5, 1861, sec. 9.

²⁷ Voet, 20 : 1 : 14.

observed that a special mortgage bond on immovable property will not have the same effect as a sale to cancel a previously existing general legal hypothec,²⁸ which will therefore continue in force notwithstanding such special bond and will take precedence of it.²⁹

In all the mortgages thus far treated of in this chapter the mortgage, as long as it continues in force and in so far as it is in force, will entitle the mortgagee to an action *in rem*, by means of which he will be enabled to follow the property mortgaged or pledged to him into the hands of any third party who may be in *bonâ-fide* or *malâ-fide* possession of the same,³⁰ and that without being bound first to excuss the debtor or his estate.³¹ This action, according to Voet,³² will sometimes lie even against a person who has had a lawsuit with the debtor with respect to the ownership of the property mortgaged, and to whom the property has been assigned by the judgment of the Court, provided that the mortgage was granted before the institution of the action and that the creditor had at the time no notice of the claim. This will be the case whenever the property has been mortgaged by bond without delivery, unless the mortgagee both knew of the action between the mortgagor and the third party and was a party to the same. Where the property was pledged by delivery, the pledgee will be bound by the judgment between the pledgor and the third party, if he had notice of the action. The judgment will in no case affect the rights of the creditor where

²⁸ Act 5, 1861, sec. 9.

²⁹ *Lange and others v. Liesching and others*, Foord, 58; *In re Brown*, 7 S. C. 239; *Oosthuysen's Tutrix v. Moffatt and another*, 5 S. C. 319.

³⁰ Voet, 20 : 4 : 1, 2; Schorer, Note 263.

³¹ G. 2 : 48 : 32; V. D. K., Th. 434.

³² Voet, 20 : 4 : 2.

there has been collusion between the debtor and the third party.³³

A general conventional mortgage gives the mortgagee no possessory or quasi-possessory rights over any portion of the debtor's property, whether movable or immovable, and consequently he has no power either to interfere with the debtor's right of alienating or disposing of his own property or pledging or mortgaging the same to third parties or to prevent other creditors, who have obtained judgment against the debtor, from attaching such property in execution of such judgment. The only rights it does confer upon the mortgagee is a right of preference upon the estate of the debtor in case it should afterwards be sequestrated as insolvent. This preference will apply generally to all the property found in the insolvent estate, movable as well as immovable, which is not subject to some special hypothec or pledge;³⁴ but not to assets situate at the domicile of the insolvent, where the bond was registered elsewhere.³⁵ Exactly the same rules may be laid down with respect to a *general clause* in a special bond on immovable property, and when two joint owners of land have specially mortgaged such land by bond containing the general clause, the general mortgage thus constituted will give the mortgagee a general preference upon their separate estates, but not against their partnership estate, if they are partners, and though in the general clause they purported "jointly and severally" to bind their persons and property according to law, the words "jointly and

³³ Voet, 20: 4: 2.

³⁴ *In re Richardson*, 1 Menzies, 423; *Campagne Française v. Cornwall, N. O.*, 3 H. C. 442; *Standard Bank v. Wentzel and Lombard*,

(1904) T. S. 828; V. L., vol. 2, p. 103; Pol. Ord., April 1, 1580 (1 Gr. Pl. Boek, 338).

³⁵ *Peach & Co. v. Simon's Trustee*, 13 S. C. 57.

severally” creating a partnership debt in favour of the mortgagee in concurrence with the other creditors upon the partnership estate, but giving them no preference upon such estate.³⁶

A conventional hypothec of movables by deed without delivery is in exactly the same position with respect to the movables specially mortgaged as a general bond is with respect to the general assets of the debtor,³⁷ with one exception, namely, that a purchaser who accepts movable property from a seller with the knowledge that it had been previously specially mortgaged to a third party, would seem to have no greater rights in regard to such property than the owner himself would have had; in other words, he takes it subject to the hypothec,³⁸ which would not be the case where a purchaser had notice of a previously existing general bond.

In the case of a ceded bond the cessionary has exactly the same rights as the original mortgagee or cedent, and is liable to the same defences.³⁹

³⁶ *In re J. F. Long & Co.*,—*Ebden v. Syfret*, N.O., 3 Searle, 11.

³⁷ *Smuts v. Stack*, 1 Menzies, 299; *In re Russouw*,—*Sequestrator v. Thomson & Geyer*, 1 Menzies, 479; *Hare v. Trustee of Heath*, 3 S. C. 32; *Mangold Brothers v. Eskell*, 3 S. C. 48; *Guest v. Le Roex's Trustees*, 5 S. C. 119; *Francis v. Savage & Hill*, 1 S. Af. Rep. 33; *Keet v. Dell*, 1 S.

Af. Rep. 111.

³⁸ *Coaton v. Alexander*, 9 Buch. 17; *Meyer v. Botha & Hergenröder*, 1 S. Af. Rep. 49.

³⁹ *Trustees of the Western Province Bank v. Horak's Trustees*, 5 Searle, 122. See also *Heydenrych v. Trustee of Mackie, Young & Co. and the Standard Bank*, 22 S. C. 268, and 16 Cape Times, 88.

CHAPTER XXXIII.

WHEN MORTGAGE TAKES EFFECT.

THE vesting of mortgage, whatever its particular legal value may be, takes effect in the case of a mortgage bond, whether general or special, immediately upon the registration of the bond. In the case of a general bond, and of a special bond on movables, the mortgage, as already shown,¹ cannot be enforced as a preference except in the case of a *concursum creditorum*, that is, against the insolvent estate of the debtor, but in that event it takes effect or precedence not from the date of the insolvency, but retrospectively from the date of the registration. With respect to any mortgage, again, whether general or special, it must be observed that it may be either simple or conditional, and that a mortgage constituted simply may be given in security not only of an obligation which is due out and out, but also of one which is subject to a condition. In the case of a conditional mortgage or of a mortgage given in security of a conditional obligation, no principal obligation arises and consequently there can be no mortgage accessory to it, until the condition has been fulfilled;² but when it has been fulfilled, the mortgage will take rank and precedence not necessarily from the date of such fulfilment, but may date back to the date of the registration of the bond, the decision of the question depending upon the nature of the condition. Where the fulfilment of the condition depends upon circumstances which are wholly independent of any action on

¹ See p. 280, above.

² Voet, 20: 4: 1; 1 Holl. Cons., c. 291.

the part of the debtor and beyond his control, the hypothec will, immediately upon such fulfilment, have retrospective effect to, and take precedence from, the date of its registration. Consequently the holder of a bond which is subject to a condition of such a nature, which has since been fulfilled, will in the distribution of the insolvent estate of the debtor be preferred to the holder of a later unconditional bond which was granted whilst the condition of the conditional bond was still pending.³

On the other hand, where it is entirely at the option of the mortgagor whether the condition is to be fulfilled or not, as where such fulfilment is dependent upon the performance of some act, such as the incurring of some debt in future by him, the mortgage will take priority from the date of such fulfilment and not from the date of the registration of the bond.⁴ Consequently it has been held that a bond given in security of future advances takes priority not from the date of its registration but from the dates upon which the advances are actually made and the debts incurred, and that it will consequently have to be postponed to another bond the obligation secured by which became due before the fulfilment of the condition.⁵

A pledge of movables by delivery takes effect immediately upon the delivery of the property, and a *pignus prætorium* immediately upon the attachment of the property by the Sheriff or Messenger of the Court.

With respect to all legal mortgages it may be stated generally that they take effect *ipso jure*

³ Voet, 20 : 4 : 30.

⁴ Voet, 20 : 4 : 30 ; 1 Holl. Cons., c. 291 ; 4 Holl. Cons., c. 134.

⁵ *Heydenrych v. Standard Bank*, 16 Cape Times, 85, and 2 Buch. App. C. 279.

immediately a certain legal relationship and consequent liability come into existence, without the necessity of any registration or any judicial act.⁶ A landlord's lien, for instance, as already shown,⁷ takes effect *ipso jure*, whenever rent is due, immediately any movable property is brought into the premises or any produce harvested, and not merely from the date of the interdict or the order of Court attaching the property.

The lien or right of retention of persons who have expended labour or incurred expense upon or with respect to property actually in their possession also vests *ipso jure* immediately their claim for compensation for such labour or expenditure arises.

The tacit general hypothec of Government, again, is considered as constituted, as regards taxes, immediately a tax becomes due, and, as regards the estates of receivers of the revenue, upon the day such receivers enter upon their office, and not merely from the date that the revenue is collected or misappropriated by them.⁸ In the same way the legal hypothec of minors and persons placed under curatorship commences and takes effect when the guardian enters upon his administration, and not when the guardian or curator begins to act negligently or fraudulently, and consequently it is preferred, whilst it lasts, to the claims of all others who have acquired special hypothecs since the appointment of such guardian or curator.⁹

As regards legatees and fideicommissaries, their right as against the estate of the testator, whether it

⁶ Voet, 20: 1: 11.

⁷ See p. 274, above.

⁸ *In re Buissonne*,—*Van der Byl & Meyer v. Sequestrator and Attorney-General*, 1 Menzies, 321; *In re Bissinne*,—*Croeser v. Sequestrator and Attorney-General*, 1 Menzies,

330; *In re Stoll*,—*Cloete v. Colonial Government*, 2 Menzies, 325.

⁹ *Trustees of Brink v. Van Reenen and others*, 5 Searle, 162; Voet, 20: 2: 17, 18; G. 2: 48: 37; Schorer, Note 264.

is called a tacit hypothec or anything else, vests immediately the right to the legacy or to the reversionary right under the *fideicommissum* vests, namely, upon the death of the testator, even though there may be several bequests, of which some are of an earlier and others of a later date, or some simple and others conditional.¹⁰

CHAPTER XXXIV.

THE RANKING OF CREDITORS.

WITH respect to the question as to the order of ranking of creditors, it may be premised that the proper *forum* for deciding the same is the Court of the place of domicile of the insolvent.¹

As will have been seen from what has been stated above, there are some mortgages, such as general bonds and special bonds on movables, which can only be enforced as a preference in case of the insolvency of the mortgagor or mortgage debtor and against his insolvent estate. In considering, therefore, the question of the order of priority of mortgages between themselves, it will be necessary to consider the case of an insolvent estate and the order in which mortgages rank or take precedence upon the same, and in order to make the inquiry complete it may be advisable to consider the whole subject of the ranking of creditors in the distribution of an insolvent estate, and for this purpose to take the case of the estate of a deceased

¹⁰ Voet, 2: 2: 22.

¹ *Paterson's Marriage Settlement*

Trustees v. Paterson's Trustees in Insolvency, 2 Buch. 111.

person which has been found to be insolvent immediately after his death and has consequently been surrendered or sequestrated as insolvent.

The creditors of an insolvent or deceased person are, strictly speaking, only those who had a personal claim or *jus in personam* against such person before his insolvency or death. From these have to be distinguished (1) persons portions of whose property *in specie* are to be found in the estate of the debtor, which property they are entitled to recover by a real action or *rei vindicatio*, and are therefore spoken of as *vindicantes*; (2) those creditors who have the right to a separation of goods; and (3) the creditors of the administration, or *creditores massæ*.

The claim of the first class to have their property restored to them before there can be any question of a distribution of the debtor's estate amongst his creditors proper is absolute.² Hence it follows that stolen property which has not at any time since it was stolen passed through the hands of a *bonâ-fide* purchaser at market overt,³ and other property of which the *dominium* or ownership for some reason or other was not vested in the insolvent, though he may have purchased it, as also property which he had merely on loan, or on deposit, or pledge, or with respect to which he had merely the life-usufruct (though, if the insolvent be still alive his life-usufruct may be realized for the benefit of his creditors) or a fiduciary right under a *fideicommissum*, or which he held as the agent of another, will have to be excluded from the administration of the estate. But where such property

² V. D. K., Th. 448; V. D. L. 178.

³ *Van der Merwe v. Webb*, 3 E. D. C. 97; *Woodhead, Plant & Co.*

v. Gunn, 11 S. C. 4; *Retief v. Hamerslach*, 1 S. Af. Rep. 171; Voet, 20: 4; 13, 37.

had previously been in the hands of the insolvent, but cannot be found in his estate at the time of the liquidation thereof, the owners of such property will have no preference upon the estate for the value of their property, but will rank merely as concurrent creditors.⁴ As regards deposits, Voet remarks⁵ that by a special law persons who have deposited money with bankers not as an investment, but merely for safe custody, were preferred over other creditors, and that such deposits were not liable even for the costs of administration, which otherwise have a preference over all other debts.⁶ At the present day, it is submitted, the only question would be whether the money was left with the bank as a *depositum*, that is, for safe custody merely, not to be used by the bank, but to be returned to the depositor *in specie*, or whether it was given to the bank under a contract of *mutuum* or loan, not to be returned by the bank *in specie*, but to be used and repaid in other current coin.

But, supposing that property belonging to a third party has been sold in execution of a judgment against the insolvent, will the owner of such property have a preference upon the insolvent estate for the proceeds of the same? Upon this point Voet writes as follows:—“Whether owners who have allowed their property to be sold in execution of a judgment against another and to be delivered to the purchaser without objecting are to be preferred as to the proceeds of such sale over other creditors, as though the price took the place of the thing, is doubtful. Clearly, whenever they have not interfered with the sale in execution and the delivery of their property because they were minors

⁴ Voet, 20 : 4 : 13, 15, 18.

⁵ Voet, 20 : 4 : 14.

⁶ Voet, 20 : 4 : 14 ; 46 : 2 : 5, circa medium.

or absent or ignorant of the sale, or for any other reason for which *restitutio in integrum* against such sales is granted to majors, it is right that they should have a preference as to the proceeds. For since they could by virtue of such *restitutio* have claimed their property back even from the purchasers, so much the more, if they are willing to be satisfied with the price in order not to upset the sale in execution, ought they to be preferred with reference to the price which would clearly have been lost to the creditors if, the property itself having been claimed by eviction, the purchaser had recovered the price paid by him.⁷ But if they can show no such just excuse for having neglected to intervene or object to the sale as would have entitled them to *restitutio*, they will merely have to rank with the other concurrent creditors as regards the proceeds of the sale of the debtor's property and their own, provided they have taken steps to guard their own interests and made proof of their claims before the judgment as to the order of preference amongst the creditors has been given. For when the judgment as to the preference has once become a *res judicata*, it is quite clear they will lose not only the ownership of the property, but also all right to any action they might have had, even as concurrent creditors to the price of such property."⁸

The second class of persons who are to be distinguished from creditors proper are those who are entitled to claim a separation of goods from the estate of the debtor, and are spoken of by the text-writers as *separatistæ*. These are the following:—

(1) The creditors of a deceased person to whom the debtor is heir may, if their claims have not yet

⁷ See Voet, 4: 4: 16; 4: 6: 10;
2 Holl. Cons., c. 324.

⁸ Voet, 20: 4: 15.

been settled, and if property belonging to such deceased person is still in existence *in specie* in the estate of the debtor, claim that such property shall be separated from the debtor's for the purpose of being realized to pay their claims.⁹

(2) The same is the case with the legatees of such deceased persons, and this bears out what was said above,¹⁰ namely, that to speak of a tacit or legal hypothec of legatees over the property of the testator found in the estate of the heir is a misuse of terms. The same may also be said with respect to fideicommissaries of whose fideicommissary interests the debtor is the fiduciary, who may claim that any property belonging to the testator or *fideicommittens* shall be separated from that of the debtor and realized for the satisfaction of their fideicommissary claim.

The third class, or *creditores massæ*, are those whose claims have reference to the costs of administration or of the liquidation and distribution of the estate of an insolvent or deceased debtor. These claims are not debts which were due by such insolvent or deceased person before his insolvency or death, but are rather debts due by his creditors or others interested in his estate, the costs having been incurred for their benefit. These costs accordingly take precedence over all debts due by the debtor himself, and will have to be paid before there can be any question of a distribution of the estate among his creditors.¹¹ They include all expenses necessarily incurred by the executor or trustee in the administration or liquidation of the estate, as also the costs of obtaining the sequestration of the estate.¹²

⁹ V. L., vol. 2, p. 115; Voet : 42 : 6.

¹⁰ See p. 258, above.

¹¹ Voet, 20 : 4 : 14; V. D. L. 178.

¹² Ord. 6, 1843, sec. 8; Voet, 20 : 4 : 16; 11 : 7 : 9; V. D. K., Th. 461, 466.

Creditors proper may be classed under three heads, namely, privileged creditors, mortgage creditors, and concurrent creditors, of whom privileged creditors take precedence of mortgage creditors, and these latter, again, of concurrent creditors.¹³

Of privileged claims there are only two, namely, funeral expenses and medical fees.

As regards funeral expenses, every person, by whom the funeral of any deceased person shall be performed, or caused to be performed, is entitled, for the amount of the expenses of such funeral, at least in so far as the same were suitable to the position of the deceased, to a preference on his estate over any other debt or claim which may have been owing by the deceased at the time of his death, or which may have arisen against his estate since his death;¹⁴ but such claim will not be entertained until the administration or liquidation expenses have been paid.¹⁵

A medical man has a preference upon the insolvent estate of a deceased person, whose estate has been sequestrated since his death, for his fees for attending upon such person during his last illness,¹⁶ but not fees due for attendance during previous illnesses.¹⁷

Of mortgage creditors some are privileged and others not, the privileged, of course, taking precedence of the non-privileged. Privileged mortgages, strictly so-called, are at the present day very few in number. The Government in Holland used to have a privileged mortgage for certain real taxes which were intended

¹³ Voet, 20: 4: 16.

¹⁴ Ord. 104, 1833, sec. 12; Voet, 11: 7: 10; 20: 4: 16, 36; G. 2: 48: 14; V. D. K. Th. 418, 452, 466; Schorer, Note 245; V. L., vol. 2, p. 93; V. D. L. 178.

¹⁵ *Tiffin v. Harsant*, N. O., 6 Buch.

50.

¹⁶ *In re Wolff*, 6 S. C. 127.

¹⁷ *In re Roux*, 2 Menzies, 318; Voet, 11: 7: 15; G. 2: 48: 14; V. D. K., Th. 418, 452; Schorer, Note 245; V. L., vol. 2, p. 93.

to be applied to the preservation of the immovable property upon which they were levied, such as taxes for the repair of the dykes, canals, dams, mills, sluices, reservoirs, and other structures connected with the drainage works,¹⁸ and which therefore took precedence of all prior encumbrances on such property; but this was not the case with respect to other taxes,¹⁹ and there is nothing in the circumstances of this country to call for any privilege in favour of Government. It has accordingly been decided that the Government has no privilege with respect to its legal mortgage over the estates of receivers of the revenue.²⁰

Amongst conventional mortgages the principal, if not, strictly speaking, the only privileged, mortgage is the *kustingbrief*. Certain kinds of mortgage there may be which by their very nature are privileged over other kinds or afford greater security or more extensive rights than these, but the *kustingbrief* is privileged amongst other mortgages of its own kind. A *kustingbrief* is a special hypothec over immovable property granted by the purchaser of such property either to the seller himself or to a third party who has advanced the money to pay such purchase price, provided it is constituted *simul et semel* with the transfer of the property to the purchaser.²¹ The same is the case with special hypothecs granted by the purchaser in the place and stead of bonds previously existing upon the property.²²

¹⁸ G. 2: 48: 12; Schorer, Note 243; V. L., vol. 2, p. 91; V. D. L. 173.

¹⁹ *Hunter's Trustees v. Colonial Government*, 4 S. C. 448.

²⁰ *In re Buissonne*,—*Van der Byl & Meyer v. Sequestrator and Attorney-General*, 1 Menzies, 318.

²¹ *Ibid.*; *In re Buissonne*,—*Croeser v. Sequestrator and Attorney-General*, 1 Menzies, 330; *Warner's Trustee v.*

Wicht, 4 S. C. 463; Voet, 19: 1: 22; V. D. K., Th. 179, 432, 437, 469; G. 2: 48: 29; Schorer, Note 242.

²² *In re Bloemmestein*,—*Executors of Van der Poel v. Marais and others*, 2 Menzies, 360; *In re Magodas*,—*Leeuwer v. Trustee of Magodas*, 2 Menzies, 344; *Hiddingh v. Boubaix*, 8 Buch. 44.

A deed of *kinderbewys* may be said to be privileged as long as the legal mortgage of the children, in security of which it is given, is still in existence and not yet lapsed under Act 5, 1861, sec. 3;²³ but the privilege or preference is in that case due rather to the tacit or legal hypothec than to the conventional *kinderbewys*.

Creditors, who have a right of retention of property belonging to another until their claims are paid, are by the very nature of their right absolutely privileged with respect to the proceeds of such property, whether their right of retention is due to a contract, as in the case of a pledge of movables by delivery, or arises by force of law, as in the case of builders and others who are in possession of property upon which they have expended money or labour, or in the case of a landlord's lien which has been confirmed by attachment. In all these cases the privilege is due to the fact that the person who is in possession is entitled to retain possession until the debt or other obligation due to him is paid or satisfied.²⁴ A pledge of movables by delivery, therefore, is preferred with respect to the proceeds of such property over all prior mortgages, whether these be legal general mortgages or conventional general or special hypothecs of such property without delivery,²⁵ and the same will also be the case with respect to a *pignus prætorium* or judicial lien due to the attachment of the property in execution of a judgment,²⁶ which, whilst it remains in force, is

²³ See the distribution in the case of *In re Kotzé*,—*Louw v. Trustee and Creditors of Kotzé*, 2 Menzies, 67.

²⁴ Voet, 20 : 4 : 19, 37; V. D. K., Th. 449, 450, 453.

²⁵ *In re Woeke*, 1 Menzies, 554.

²⁶ *Mangold Brothers v. Eskell*, 3 S. C. 48; *Diering v. Furney and*

others, 1 H. C. 112; *Reed v. Lee*, Kotze, 130; *Keet v. Zeiler*, 1 S. Af. Rep. 18; *Keet v. Dell*, 1 S. Af. Rep. 109; *Moller v. Natal Bank*, 1 Off. Rep. 78; *Natal Bank v. Martinis & Co.*, 2 Off. Rep. 232; *Quin v. Mego*, 2 Off. Rep. 141.

of exactly the same legal force and effect as a pledge accompanied with delivery, and therefore cannot override a previous pledge of the same kind.²⁷ The same is also the case with a landlord's lien as regards *illata et invecta* and fruits actually found upon the land leased at the time of the insolvency of the debtor²⁸ or which have been attached by order of Court, which lien is privileged in the same sense as a pledge of movables.

With respect to non-privileged mortgages the following general rules may be laid down:—

(1) All mortgages of the same kind or of the same legal value take rank amongst themselves in order of time, the earlier in point of time taking precedence of those of a later date.²⁹

(2) A special conventional hypothec of immovable property and a legal general hypothec are of exactly the same legal value,³⁰ so that, where there are one or more of the former and one or more of the latter, they all rank amongst each other in order of time, in accordance with the first rule.³¹

(3) Both a special conventional hypothec and a legal general hypothec are preferred to a general bond and to a special bond on movables without delivery.³²

(4) A special bond on movables without delivery is of the same legal value as a general bond.³³

(5) A general bond is preferred to unsecured creditors.³⁴

As to the first of these rules, it must be observed

²⁷ *In re Woeke*, 1 Menzies, 554.

²⁸ V. D. L. 178.

²⁹ Voet, 20 : 1 : 14 ; 20 : 4 : 16, 27, 28 ; G. 2 : 48 : 35 ; V. D. K., Th. 469 ; V. L., vol. 2, p. 103 ; V. D. L. 179.

³⁰ *Hull v. McMaster*, 5 Searle, 227 ; Voet, 20 : 1 : 14 ; V. L., vol. 2,

pp. 91, 103 ; V. D. L. 179.

³¹ G. 2 : 48 : 36 ; V. D. K., Th. 437 ; Schorer, Notes 263, 264.

³² G. 2 : 48 : 34 ; V. D. K., Th. 436, 447 ; V. L., vol. 2, p. 103.

³³ Schorer, Note 262.

³⁴ G. 2 : 48 : 34 ; V. L., vol. 2, p. 19.

that all mortgage bonds rank in order of precedence, not according to their dates of execution, but according to their dates of registration, and consequently an earlier bond which was not duly registered until a later bond had already been registered will be postponed to the latter.³⁵ In order to establish a preference it makes no difference whether the priority in time is one of days or one of hours or minutes merely, for whenever two bonds appear as registered on one and the same day, the one which is first on the register will take precedence,³⁶ unless it can be proved that they were both executed at one and the same time, in which case they will rank concurrently, and be entitled to be paid *pro rata*.³⁷ Nor will it make any difference that the second bond was accepted by the holder thereof under the impression that it was a first bond, and that the bond actually purported to be a first bond.³⁸ Priority of time may, however, be waived and preference due to such priority will be lost where the person entitled to it has fraudulently led the holder of the second bond to believe, when accepting the second bond, that he was getting a first bond.³⁹

In support of the second rule it has been decided that a legal general mortgage is to be preferred to a later special hypothec of immovable property, except in cases where, owing to particular circumstances, as in the case of a *kustingbrief*, a particular privilege is attached to such special hypothec.⁴⁰

³⁵ *In re Mostert*,—*Smit v. Jurgens*, 2 Menzies, 329.

³⁶ Voet, 20: 4: 29; V. L., vol. 2, p. 103.

³⁷ *Tredgold's Executors v. Colonial Orphan Chamber*, 6 S. C. 358.

³⁸ *Mutual Life Assurance Co. v. Hudson's Trustee*, 3 S. C. 264;

Schaenland & Franck v. Auret & Son, 3 S. C. 176.

³⁹ Voet, 20: 4: 33. See also Voet, 5: 3: 39; D. 20: 1: 26: 1; 20: 6: 8: 15.

⁴⁰ *In re Buissinne*,—*Van der Byl & Meyer v. Sequestrator and Attorney-General*, 1 Menzies, 322; *Hiddingh*

In illustration of the third rule, it has been decided that a special conventional hypothec of immovable property is to be preferred to a general conventional one even of prior date,⁴¹ and so also is a general legal mortgage.⁴² A wife, therefore, when she is entitled to a legal mortgage over her husband's property, will be preferred to those mortgage creditors of her husband whose hypothecs have been granted during the subsistence of the marriage, but not to conventional special hypothecs nor to legal mortgages of an earlier date.⁴³

In illustration of the first and fourth rules, it has been decided that a prior general conventional mortgage is preferent to a later special mortgage of movables unaccompanied by delivery.⁴⁴

As to concurrent or unsecured claims, these come after mortgage debts, and all rank concurrently or together without reference to the dates at which they were incurred, and are entitled to be paid *pro rata* out of the proceeds of the assets of the insolvent estate of the debtor.⁴⁵ If, however, some of these arise out of contracts based upon valuable consideration, whilst others, such as an agreement to give a donation, are based upon a lucrative title, the former will have to be paid before the claims of the latter can be entertained.⁴⁶

v. *Roubaix*, 8 Buch. 36; *In re Bloem-mestein*,—*Executors of Van der Poel v. Murais and others*, 2 Menzies, 360; Voet, 20: 1: 14; V. D. K., Th. 437; 4 Holl. Cons., c. 189, 392; Sande, Decis. Fris., l. 3, tit. 12, defin. 16.

⁴¹ *In re Buissonne*,—*Van der Byl & Meyer v. Sequestrator and Attorney-General*, 1 Menzies, 322; *Naudé v. Naudé's Trustee*, 2 Buch. 166.

⁴² *In re Stoll*,—*Cloete v. Colonial Government*, 2 Menzies, 325.

⁴³ Voet, 20: 2: 20.

⁴⁴ *In re Russouw*,—*Sequestrator, N. O., v. Thomson & Geyer*, 1 Menzies, 479; *Hare v. Trustee of Heath*, 3 S. C. 32.

⁴⁵ Voet, 20: 4: 36; V. L., vol. 2, p. 113; V. D. L. 180.

⁴⁶ Voet, 20: 4: 37.

CHAPTER XXXV.

THE EXTINCTION OF MORTGAGES.

MORTGAGES become extinguished or lost in one or other of the following ways:—

(1) By the total destruction of the mortgaged property or by the loss of the ownership thereof by *specificatio*.¹ It must be observed, however, that, as long as any portion of the property survives, the mortgage will continue in force for what it is worth. Consequently where a piece of land is mortgaged with the buildings thereon and the buildings are burnt down, the mortgage will continue in force over the land, and if new buildings are built thereon, these will become liable to the mortgage. But when the buildings have been restored by some person who is in possession of the land, the latter will, as already stated above,² have a right to retain possession of the ground until the expenses of restoration have been refunded to him, and may in this way enforce a preference over the previously existing mortgage.³

(2) By merger or confusion of the titles of debtor and creditor or of owner and mortgagee in one and the same person, as when the debtor becomes heir to the creditor, or when the creditor becomes owner of the mortgaged property, either by contract or succession or otherwise, for just as a man's own property cannot be under a servitude to himself, so also it cannot be under a mortgage to himself.⁴

(3) By the expiration of the time for which the

¹ Voet, 20: 1: 4; 20: 6: 4, 14;
G. 2: 48: 44; V. D. L. 181.

² See p. 260, above.

³ Voet, 20: 1: 4.

⁴ Voet, 20: 6: 2, 5.

mortgage was granted, if it was originally given only for a fixed period.⁵

(4) By the extinction of the mortgagor's title to the property, where such title was originally of a merely temporary character or revocable.⁶

(5) By the mortgagee making renunciation of his right of mortgage, which may be done either expressly or tacitly.⁷ The renunciation is made expressly, in the case of a mortgage bond, by the cancellation of the bond in the office of the Registrar of Deeds⁸ or by the mortgagee waiving his rights of general mortgage with respect to certain specified articles;⁹ and, in the case of a pledge, by the pledgee handing the pledged property back to the pledgor with the intention of cancelling the pledge. It is effected tacitly whenever the mortgagee does anything or allows anything to be done to or with the mortgaged property which is inconsistent with the continued existence of the mortgage, as when the pledgee consents to the property pledged to him being sold to a third party¹⁰ or to get back into the possession of the pledgor, for, as shown above,¹¹ continued possession by the pledgee is essential to the existence of a pledge. So also when the person who has the right of retention allows the debtor to take possession of the property which is subject to the lien, the lien, being based entirely upon possession,¹² at once ceases. The same rule applies to the landlord's lien, which ceases when the *invecta et illata* or the produce is removed from the land.¹³

⁵ Voet, 20 : 6 : 10 ; G. 2 : 48 : 44 ; V. D. L. 182.

⁶ *De Voss v. Colonial Government and others*, 4 S. C. 396 ; Voet, 20 : 6 : 2, 8 ; G. 2 : 48 : 44 ; V. D. K., Th. 442.

⁷ G. 2 : 48 : 44 ; V. D. L. 181.

⁸ Publication, May 23, 1805, sec. 7.

⁹ *Heynes, Matthew & Co. v. Peacock's Trustees*, 4 S. C. 406.

¹⁰ V. D. L. 181.

¹¹ See p. 243, above.

¹² See p. 260, above.

¹³ See pp. 265 and 274, above.

(6) By the ownership of the mortgaged immovable property being acquired by a prescription of thirty years by a third party whose title is not derived from the mortgagor, but adversely to him, and this may happen even though the debtor may regularly have paid the interest to the creditor.¹⁴ The course of the prescription will, however, be broken, as regards the mortgage, if during the currency of the prescription the creditor gives notice to the possessor of the existence of the mortgage.¹⁵

(7) By the payment or discharge of the original debt or obligation, in security of which the mortgage was granted or existed in law, or by anything which is in law regarded as equivalent to such payment, such as a right of compensation or set-off; for when the principal obligation is dissolved, the accessory, that is, the mortgage, is *ipso jure* extinguished with it.¹⁶ This is the case even though the bond may not have been cancelled in the office of the Registrar of Deeds or though the property held in pledge or by virtue of a right of retention may not have been redelivered to the pledgor or owner. Consequently, where there has been an agreement equivalent to the payment of a debt due under a bond, and the bond was not cancelled, but subsequently ceded for valuable consideration to a third party, such cession will be void, though the bond still stands registered in the Registry of Deeds, and the mortgagor may claim the cancellation of the bond.¹⁷ So also where a pledge has been given in security of a particular debt due, the pledge will be discharged on payment of that particular debt, nor will the pledgee

¹⁴ Voet, 20: 4: 9; G. 2: 48: 44. 44; 3: 8: 4; V. D. L. 181.
But see V. D. K., Th. 443.

¹⁵ Voet, 20: 4: 9.

¹⁷ *In re Richardson*, 1 Menzies, 422.

¹⁶ Voet, 20: 6: 2, 3; G. 2: 48:

be entitled, as against the trustee of the insolvent estate of the pledgor, to retain the pledged property in security of other debts due by the pledgor to him.¹⁸ But where mortgagees had ceded certain bonds made in their favour, in security of advances made to them, by a deed of cession which was absolute in its terms but under a verbal agreement or understanding that the cessionary might recover payment of these bonds and apply the amount received by him in extinction of the debt due to him in respect of his advances, and that in the event of his so recovering or otherwise receiving the full amount of his debt, he should be bound to return or re-cede such of the bonds as still remained unpaid, it was held that the cession had the effect of vesting all right and title in and to the bonds in the cessionary absolutely, subject to an equitable right, in favour of the persons ceding the same, of compelling the cessionary to account to them for the amounts received by him.¹⁹

Where the original debt or obligation has been paid or discharged, or payment of the same duly tendered, and the mortgagee refuses to restore the property pledged or to cancel the bond given to him, he may be compelled by action so to do.²⁰

If a mortgagor wishes to pay off a bond, but cannot find either the bondholder or any legal representative of his, the Court will, upon application, order the cancellation of the bond upon the payment of the principal sum and interest, all necessary steps being taken to safeguard the interests of the original

¹⁸ *Brink's Trustees v. South African Bank*, 2 Menzies, 381; *Haarhoff v. Cape of Good Hope Bank*, 4 H. C. 304; V. L., vol. 2, p. 90.

¹⁹ *Sutherland v. Elliott Brothers*, 2 Menzies, 349.

²⁰ *Michel v. De Villiers*, 17 S. C. 85.

mortgagee or any possible cessionary of the bond, as, for instance, by having the money paid into the Master's office, subject to the condition that it is not to be paid over by the Master without an order of Court, and by having a copy of the judgment served upon the Registrar of Deeds to be filed in his office.²¹

When the debt due under a bond has been paid, it will be the duty of the Registrar of Deeds to cancel the bond in the Debt Registry upon being satisfied that the payment has actually been made, and, if he refuses to do so, he may be compelled thereto by an order of Court.²²

The consent to the cancellation of a bond is usually written across the face of the bond itself and signed by the mortgagee; but where all this has been done, and the bond with the cancellation written thereon has got lost, and cannot therefore be produced to the Registrar, the latter will be entitled to cancel the bond, if, after due notice given by him to all persons concerned, no objection is made to such cancellation.²³

The question will sometimes arise in this connection, where there is a competition amongst creditors, whether a mortgage bond entitles the bondholder to a preference for interest as well as capital. It was the rule of our common law that in case of doubt a mortgage was supposed to cover not the interest but only the principal,²⁴ and that, even where

²¹ *Ex parte Holland, q.q. Brodrick*, 2 S. Af. Rep. 143.

²² *Louw v. Registrar of Deeds*, 4 Buch. 132; *Roodt v. Registrar of Deeds*, 7 S. C. 39; *Re Kemp*, 7 E. D. C. 128; *Ex parte De Wet*, 21 S. C. 136; *Scholtz v. Registrar of Deeds*, 1 Off. Rep. 111; *Ex parte Van Reenen*, 1 Off. Rep. 112; *Newdigate v. Registrar of Deeds*, 19 S. C.

269.

²³ *McMaster v. Registrar of Deeds*, 7 S. C. 155; *Ex parte Human*, 1 Roscoe, 284; *Executors of Swart v. All and Sundry*, 2 Menzies, 323; *Ex parte Chapman*,—*In re Geertsma*, 9 S. C. 228; *In re Hopkins*, 11 S. C. 36; *Ex parte Kaltwasser*, (1906) T. S. 144.

²⁴ Voet, 20: 1: 18.

it was expressly stipulated that the bond should cover the interest, such interest should be limited to a certain number of years (which varied in different places in the Netherlands), lest mortgagees should become negligent about exacting payment of their interest, and thus allow their preferent claim to accumulate to the prejudice of later creditors who had no notice of such accumulation.²⁵ At Amsterdam preference was allowed for interest for a year, in addition to the current year, and this limit has by custom been adopted in this Colony. A mortgagee is, at the present day, therefore entitled to preference for the interest stipulated in the bond for a year, in addition to the year which was current at the date of the issue of the writ of execution or of the order of sequestration where no writ has been issued, and also for the further period from the date of such issue or order to the time of actual payment.²⁶

The preference will also cover any penalty which may be stipulated for in the bond.²⁷

The mortgagee is also entitled to preference for the costs incurred by him in rendering the property executable, including his necessary costs in obtaining judgment on his bond.²⁸

Where a mortgagee is in possession of the property which is subject to the mortgage, he will further be entitled to a preference for any necessary expenses incurred by him with respect to the property.²⁹

²⁵ Voet, 20: 4: 27; V. D. K., Th. 471; V. L., vol. 2, p. 114.

²⁶ Ord. 6, 1843, sec. 33; *In re Meiring*,—*Cloete v. Aling*, 2 Menzies, 318; *Brink, N. O., v. The High Sheriff and others*, 12 S. C. 414; *In re Standen*, 3 Buch. 92; *Guardian Assurance Co. v. High Sheriff and*

Insolvent Estate of Lippert, 20 S. C. 170; *Rooth & Wessels v. Benjamin's Trustee and the Natal Bank*, (1905) T. S. 630, 632.

²⁷ Voet, 20: 1: 18; 20: 4: 27.

²⁸ *Brink, N. O., v. The High Sheriff and others*, 12 S. C. 414.

²⁹ Voet, 20: 4: 27.

(8) By novation, which discharges the original debt or obligation. The mortgage in such a case, however, will revive with all its previous rights of priority, if it is renewed *simul et semel* with the novation.³⁰

The question whether a novation has or has not taken place is one of intention, and in the absence of any express declaration of the parties the intention to effect a novation cannot be held to exist, except by way of necessary inference from all the circumstances of the case.³¹ Consequently, where there is a doubt as to the intention of the parties, a novation will not be presumed to have taken place.³² It will not, for instance, be presumed, in the case of the tacit hypothecation of a minor, from the fact that the minor has, after attaining majority, accepted or demanded from the guardian interest upon the balance due to him by the latter, unless there is other evidence of an intention to novate the debt.³³ Again, where a mortgagor made an offer to make transfer of certain immovable property to the mortgagee in settlement of the bond, which offer was accepted by the mortgagee, upon the condition that the transfer should take place "without loss of time," it was held by the Court that this did not constitute a novation extinguishing the debt on the bond, and thus taking away the creditor's right to sue on the bond, where the mortgagor had neglected to carry out his proposal "without loss of time;"³⁴ and where the condition of a bond was that, if the mortgagor properly took up and redeemed "a promissory

³⁰ *In re Bloemmestein*,—*Executors of Van der Pcel v. Marais and others*, 2 Menzies, 360; *In re Magodas*,—*Swemmer v. Trustees of Magodas*, 2 Menzies, 344; *Hiddingh v. Roubaix*, 8 Buch. 44; Voet, 20: 4: 27, 32; 20: 6: 2; V. D. L. 181.

³¹ *Ewers v. R.M., Oudtshoorn and Trustee of Roberts*, Foord, 35.

³² G. 3: 43: 4.

³³ Voet, 20: 1: 18.

³⁴ *Meintjes & Dixon v. Harbin*, Watermeyer's Reports, 22.

note, in security of which the bond had been given, together with interest, costs, and charges, and the mortgagor at the due date of the note paid the interest, costs, and charges, but, instead of paying the amount of the note, passed two other notes in renewal with the consent of the mortgagee, it was held that this did not amount to such a novation of the debt as to discharge the bond, which therefore continued in force.³⁵

A legal mortgage is not extinguished when a conventional mortgage or sureties are given, because no man ought to be prejudiced by excess of precaution on his part;³⁶ unless, indeed, such mortgage or sureties were given as a special novation of the debt secured by the legal mortgage.³⁷ The legal mortgage also of children over the estate of a surviving parent, in security of the inheritance coming to them out of the estate of the first-dying parent, will not be lost if by a compromise the survivor has bought out the children for a certain sum of money, because no novation is thereby understood to have been effected, but rather an action for the division of the inheritance to have been settled by an adjudication.³⁸

(9) By prescription of the mortgage itself, which will take place, in the case of conventional hypothecs or mortgage bonds, if for the period of prescription the mortgagor has omitted to pay the interest due upon the bond or to acknowledge the validity of the bond in any way. Under the common law the period of such prescription was forty years,³⁹ and if the

³⁵ *Ewers v. R.M., Oudtshoorn and Trustee of Roberts*, Foord, 32.

³⁶ Voet, 20: 6: 12.

³⁷ *In re Lutgens*,—*Neethling, q.q.*, v. *Trustees of Lutgens*, 2 Menzies, 315.

³⁸ Voet, 20: 2: 24. But see the opinion of Grotius in 5 Holl. Cons., c. 133.

³⁹ G. 2: 48: 44; V. D. K., Th. 443; Groen., De Leg., C. 7: 39: 7.

headnote to the case of *Executors of Schonberg v. Executors of Vos* is correct, such is still the law with us.⁴⁰ It may, however, be pointed out that there is nothing in the body of the report to justify the headnote, and it may at least be doubted whether the period of prescription has not been reduced by the statute which has limited the period of prescription with regard to all immovable property to thirty years.⁴¹

As regards legal mortgages, the following periods of prescription have been laid down by Act 5 of 1861.

The tacit hypothecation possessed by minors and wards of full age upon the estates of their guardians or curators will terminate at the expiration of three years, reckoned, in the case of minors, from the day of their attaining their majority, and, in the case of other wards, from the day of their ceasing to be under curatorship: provided that, if the person entitled to such tacit hypothecation is absent from the Colony at the time of his coming of age or ceasing to be under curatorship, the hypothecation shall continue in force for three years from the day of his return to the Colony; and provided, further, that in no case shall the hypothecation continue in force for longer than five years from the above-mentioned dates.⁴²

The above limitations apply also to the tacit hypothecation of children upon the estates of their surviving parent in security of their paternal or maternal portions,⁴³ but not to the case of a curator nominate.⁴⁴

Short of the above periods of prescription, the tacit

⁴⁰ *Executors of Schonberg v. Executors of Vos*, 1 S. C. 325.

⁴¹ Act 7, 1865, sec. 106.

⁴² Act 5, 1861, sec. 3.

⁴³ *Hull v. McMaster and others*,

1 Roscoe, 401, and 5 Searle, 220; *Naudé v. Naudé's Trustees*, 2 Buch. 166.

⁴⁴ *Brink's Curator v. Brink's Trustee*, 5 Searle, 344.

hypothecation will not cease with the termination of the guardianship, nor even with the rendering of the accounts, but only when the balance due by the guardian or curator to the ward has been paid over in full by the former to the latter.⁴⁵

The tacit hypothecation possessed by legatees in security of their legacies upon the estates of the testators by whom the legacies were bequeathed⁴⁶ expires after the lapse of twelve months from the day upon which such legacies became due or demandable. Provided that if, upon the day when a legacy becomes due and demandable, the legatee is a minor or under coverture or absent from the Colony, the tacit hypothecation shall only cease twelve months after such disability shall cease: provided, further, that in no case shall any such tacit hypothecation continue for more than five years, whether such disability shall cease during that period or not, except in the case of a legatee who is a minor at the expiration of such five years, in which case the tacit hypothecation will not cease until the expiration of three years after his attainment of majority.⁴⁷

If a minor or other ward or a legatee dies before the tacit hypothecation to which he is entitled has become prescribed in accordance with the above rules, the heir or executor of such person shall be entitled to such hypothecation for the same time that the person so dying would, if living, have possessed it: provided that in any case such heir or executor shall have a term of not less than twelve months after the death of the person so dying within which to claim the benefit of such tacit hypothecation.⁴⁸

⁴⁵ *Trustee of Brink v. Van Reenen*
and others, 5 Searle, 162.

⁴⁶ See p. 259, above.

⁴⁷ Act 5, 1861, sec. 4.

⁴⁸ Act 5, 1861, sec. 6.

(10) By alienation of the mortgaged property in some cases.

Where movables have been pledged by delivery it is, of course, impossible for such property to be alienated without the express or tacit consent of the pledgee, delivery being essential to the alienation of movables. In the same way it is impossible for immovable property which is specially mortgaged to be alienated without the mortgagee's consent, except by some mistake in the office of the Registrar of Deeds which cannot affect the rights of the mortgagee.⁴⁹ In neither of these cases, therefore, can the question of the extinction of mortgage by alienation arise. But it may arise whenever movables have not been delivered to or are not in possession of the person who has a pledge or mortgage over them, and whenever immovable property has no special mortgage registered against it. In other words, it can only happen in the case of a general mortgage, whether conventional or legal, and in the case of a special hypothec of movables without delivery. In all such cases a mortgage is absolutely extinguished as regards movables by the complete alienation of the property by the owner thereof,⁵⁰ and the preference afforded by it will also be lost by the pledge of the property to a third party, or by the attachment of the property in execution of a judgment,⁵¹ which, as already shown,⁵² has the same effect as a pledge. This is in accordance with the maxim of our law *mobilia non habent sequelam*,⁵³ which,

⁴⁹ For a curious case of this kind, in which the point here raised was not, however, decided, see *In re Blanckenberg*,—*Watermeyer v. Heckroodt and Kuuhl*, 1 Menzies, 477.

⁵⁰ Voet, 20: 1: 14; 20: 6: 6; G. 2: 48: 29; Schorer, Note 259; V.

D. K., Th. 432; V. L., vol. 2, pp. 104, 105.

⁵¹ *Hare v. Trustee of Heath*, 3 S. C. 34.

⁵² See p. 251, above.

⁵³ Voet, 20: 4: 3.

however, applies more strictly to movables pledged by delivery, in which case it presupposes that the alienation is made *bonâ fide* and for valuable consideration.⁵⁴ Consequently, when a purchaser receives articles with a knowledge that they are pledged, he will have no greater right than the seller himself had, that is, he takes the property subject to the pledge.⁵⁵

As regards immovable property, a general mortgage, whether legal or conventional, will become extinguished by the alienation of such property, provided such immovable property has been transferred to a *bonâ-fide* transferee⁵⁶ for valuable consideration, but not where the transfer takes place without valuable consideration, the reason for the distinction being that in the latter case the transferee would be enriched at the expense of the mortgagee unless the general mortgage continued in force.⁵⁷

(11) A mortgage may, of course, be extinguished by a decree of Court, which will happen, in the first place, when a mortgage is cancelled or set aside on the grounds of some such initial defect, *e.g.*, fraud as between the parties, as would invalidate any contract,⁵⁸ or as against other creditors,⁵⁹ or on the grounds set forth in sections 83, 84, and 85 of the Insolvent Ordinance.

A mortgage or pledge will also be extinguished when there has been an action between the debtor and a third party with respect to the ownership of the property mortgaged, and the property has by judgment

⁵⁴ *Hare v. Trustee of Heath*, 3 S. C. 34; *Mangold Brothers v. Eskell*, 3 S. C. 50; *Meyer v. Botha and Her-genröder*, 1 S. Af. Rep. 47.

⁵⁵ *Coaton v. Alexander*, 9 Buch. 17.

⁵⁶ No mortgagee will, however, be regarded as a purchaser or transferee (Act 5, 1861, sec. 9; *Oosthuysen's*

Tutrix v. Moffat, 5 S. C. 324).

⁵⁷ Act 5, 1861, sec. 9; Voet, 20: 1: 14; G. 2: 48: 24; Schorer, Note 256; V. D. K., Th. 429; V. L., vol. 2, p. 104.

⁵⁸ *Kitshoff v. Daly's Trustees and others*, 5 Searle, 213.

⁵⁹ G. 2: 48: 6.

of the Court been assigned to the latter, provided the mortgagee was a party to the action in the case of a hypothec or had at least notice of the action in case of a pledge.⁶⁰

A mortgage is extinguished indirectly by a decree of Court whenever the mortgaged property has been sold in execution of a judgment of the Court, in which sale due regard is paid to the rights of all mortgagees and other claimants to the property.⁶¹ In such a case it is the right and duty of all mortgagees and others who claim any right to the property to file their claims with the Sheriff before the property has been sold in execution or the sale confirmed; and if they fail to do so they have only themselves to blame.⁶² Consequently, a *bonâ-fide* possessor of land who is entitled to compensation and a right of retention for improvements made on the land will lose this right if he allows the land to be sold in execution to a purchaser, who has no notice of his rights, without raising any objections.⁶³

A judicial mortgage, or *pignus prætorium*, becomes extinguished indirectly by a decree of Court when the estate of the debtor is sequestrated as insolvent, for where the debtor becomes insolvent before the money realized by the sale of the goods taken in execution has been paid over to the judgment creditors, the preference of the creditor ceases, except as regards his mere costs of execution.⁶⁴

The validity or legal effect of a mortgage bond is not in any way destroyed, impaired, or affected by having been filed in an insolvent estate, except in so

⁶⁰ Voet, 20: 4: 2.

⁶¹ Rules of Court 105-122, 363-368; Ord. 37, 1828, secs. 8, 9, 11; Act 17, 1886, sec. 7.

⁶² Voet, 20: 5: 8, 9, 11.

⁶³ *South African Association v.*

Van Staden, 9 S. C. 95.

⁶⁴ Ord. 6, 1843, sec. 22; *Mangold Brothers v. Eskell*, 3 S. C. 50. Formerly it was different (See *In re Richardson*, — *Meinert v. Nisbet & Dickson*, 1 Menzies, 425).

far as the mortgagee may have received payment of his debt out of the estate, and if the property specially mortgaged by it has remained unsold in the estate the mortgage will continue to attach to it.⁶⁵

CHAPTER XXXVI.

HOW MORTGAGE IS ENFORCED.

IF at the due date of any mortgage debt or other obligation the same is not paid or satisfied in some way or other, the mortgagee will be entitled to take the necessary steps to have the property which is subject to the mortgage realized, in order to have his claim satisfied. This realization the mortgagee cannot, as a rule, carry out by selling the property himself, except with the consent of the debtor,¹ but can only effect by first obtaining a judgment of the Court upon his mortgage debt and then taking out a writ of execution against the property² and having the same sold by the Sheriff or other officer of the Court appointed for such purposes.

If the mortgaged property is immovable, a special order of Court will be required declaring such property executable before it can be taken in execution.³

A judgment will be required even where it was originally agreed between the mortgagor and mortgagee that the latter should have the right to sell the

⁶⁵ *In re Theron*,—*Meyer v. Rogerson & Lorentz, q.q., and others*, 1 Menzies, 508.

¹ *Goate v. Bergsma*, 4 H. C. 369; Schorer, Note 266; V. D. K., Th. 439.

² G. 2 : 48 : 41; V. D. L. 180.

³ Rule of Court, 36; *Cape of Good Hope Bank v. Mellé*, 10 S. C. 289; *Whinney, N. O., v. Gardner, N. O.*, 10 S. C. 34; Voet, 20 : 5 : 3.

mortgaged property by his own private authority and without a judgment of the Court, in case the mortgagor afterwards objects to such private sale or in case a private sale would be prejudicial to other hypothecary creditors.⁴ But where a borrower had, in order to secure the amount of a loan obtained by him, let a piece of ground to the lender for a certain period at a rent equivalent to the interest on the loan, and further agreed that should he fail to repay the amount within such period, the land should become the property of the lender and the amount of the loan should be regarded as the purchase price thereof, and, the borrower having failed to repay the loan within the time, the lender thereafter remained in possession of the land for several years and was treated in every respect as the owner thereof by the borrower, short of transfer being passed: it was held that, in the absence of any evidence to show that the price was unfair or unreasonable at the time of the transaction, the lender was entitled to demand transfer from the estate of the borrower who had since died.⁵

In the case of the insolvency of the debtor, it is the trustee of his insolvent estate, and not the mortgagee or pledgee, who is entitled to take possession of and realize the mortgaged or pledged property.⁶

The personal action upon the mortgage debt can, of course, not be instituted until the terms of the bond or of the agreement of pledge have been fulfilled.⁷ Consequently, where a mortgage bond stipulates for a certain notice before payment can be demanded, such

⁴ Voet, 20 : 5 : 6.

⁵ *Ex parte Mabunya*, 20 S. C. 165.

⁶ *Whinney, N. O., v. Gardner, N. O.*, 10 S. C. 341; *Cape of Good Hope Bank v. Mellé*, 10 S. C. 289;

Orsmond's Trustees v. Hofmeyer, 4 S. C. 43; Ord. 6, 1843, sec. 48.

⁷ *Colonial Treasurer v. The African Agricultural and Finance Corporation*, (1905) T. S. 76.

notice will have to be given before the bond can be sued on,⁸ and the necessity for such notice will not be done away with by the death of the mortgagor, but notice will have to be given to his executors.⁹ But where an executor had given notice to creditors in terms of sec. 30 of Ordinance 104 of 1833, calling upon them to lodge their claims, whereupon the mortgagee had lodged his bond claim, it was decided that this did away with the necessity for the notice required by the bond, at any rate where the period of time required for such notice had expired between the date of the lodging of the claim and the institution of the action.¹⁰

Where a mortgage bond provides that the interest is to be paid on a fixed date, failing which the capital sum is to become due and payable forthwith, such penalty clause will, as a general rule, become enforceable immediately upon failure to pay the interest on the due date. The Courts will not, however, enforce this penalty as a matter of course, but will inquire into the circumstances and decide according to the equities of each case.¹¹

A mortgage is an indivisible right, and consequently a mortgagee cannot be compelled, if there are several joint mortgage debtors, to split up his right of mortgage and release the share of each mortgagor upon his paying his share of the debt, but may insist upon being paid in full or having the whole property sold in execution. In the same way,

⁸ *Katzen v. Moore*, 20 S. C. 414; *Chiappini Brothers v. Schneider*, 22 S. C. 145; *Blake v. Cortis*, 20 S. C. 163.

⁹ *Smuts v. Executors of Haupt*, 1 Menzies, 70.

¹⁰ *Southey v. Borchersds, Executor*

of Dormehl, 1 Menzies, 22.

¹¹ *Rimer v. White*, 21 S. C. 6; *Equitable Fire Assurance and Trust Company v. Wainwright*, 9 Buch. 206; *Parkin v. Spies*, 21 S. C. 564. See also *Netherlands Bank v. Reserve Investment Co.*, (1906) T. S. 179.

if several properties have been mortgaged for one and the same debt, it will be free to the creditor to take out execution against any one of these he pleases or against all, unless his debt be paid in full;¹² and if the mortgaged property has been split up and divided, the mortgagee will retain his full right against each portion.¹³

Where judgment has been obtained upon a special mortgage bond containing the general clause, the plaintiff may at once take out execution against the defendant's movable property, although the specially mortgaged immovable property has been declared executable and would be sufficient to pay the debt.¹⁴

Again, if property is mortgaged to several persons *in solidum* and payment is made to one of his share, the whole property will still remain mortgaged to the others, nor can the mortgagor claim to have a part of the property released in consequence of the part payment.¹⁵

As already pointed out,¹⁶ a mortgagee may, of course, insist that the property shall be sold in exactly the same state of freedom from encumbrance in which it was at the time of the granting of the mortgage. Consequently, where an encumbrance has been placed upon the property since that date, by which the value of the mortgagee's security has been diminished, so that the property will not realize the amount of the mortgage when sold burdened with the encumbrance, the mortgagee may insist that it shall be sold free from the encumbrance.¹⁷

¹² Voet, 20: 4: 4; Schorer, Note 261.

¹³ G. 2: 48: 42.

¹⁴ *Agar and others v. Denyssen*, 2 Searle, 140.

¹⁵ Voet, 20: 4: 7.

¹⁶ See p. 276, above.

¹⁷ *Dreyer's Trustee v. Lutley*, 3 S. C. 59; *Stewart's Trustees and Marnitz v. Uniondale Municipality*, 7 S. C. 110; *Haupt's Trustee v. Haupt & Co.*, 1 Searle 287; *Albertyn*

As between earlier and later mortgages, the Roman law gave a later mortgagee the right of paying an earlier one what was due to him, even against the will of the latter and of the debtor himself, and of stepping into the place of such earlier mortgagee.¹⁸ This right, however, does not obtain with us, inasmuch as the later mortgagee can with us effectively enforce his right of mortgage by action against the mortgagor and by taking out execution against the mortgaged property.¹⁹ If the property does not realize sufficient to pay both mortgages, the later mortgagee has only himself to blame for having advanced money on insufficient security. In the mean time he may protect himself by bidding at the sale in execution, and, if necessary, buying the property, and, if he does, he will be entitled to offer his bond in payment or part payment of the purchase price.²⁰ The holder of an earlier mortgage may, however, insist that a reserve price shall be put upon the property at the sale in execution, so that his interests may be protected as far as possible.²¹

and another v. Van der Westhuysen and others, 5 S. C. 386; *Van Wyk's Trustee v. Van Wyk and another*, 13 S. C. 498; *Wiber v. Mohodini*, 21 S. C. 645; *Henderson Consolidated Corporation v. Registrar of Deeds and another*, (1903) T. S. 661; *Cape Commercial Bank v. Fleischer and van Rensburg*, Kotze, 1; *Reed's Trustee v. Reed*, 5 E. D. C. 23.

¹⁸ Voet, 20: 4: 34; 20: 5: 1; G. 2: 48: 43.

¹⁹ *Bank of Africa v. Frames*, 1 Cape L. J. 236; *Griqualand Board*

of Executors v. Green, 7 H. C. 97; Voet, 20: 4: 35; Schorer, Note 267; V. D. K., Th. 441.

²⁰ *Eaton, N. O., v. Johnstone*, 1 Menzies, 90.

²¹ Rules of Court 108 and 113; *South African Association v. Roberts*, 8 Buch. 60; *Dewhurst v. Rintel*, 1 Cape L. J. 60; *The Estate of Eaton Goodson and another v. Bathgate*, 20 S. C. 201. See also *Netherlands Bank v. Reserve Investment Co.*, (1906) T. S. 176.

INDEX.

BOOK II.

A.

	PAGE
ABANDONED property, acquisition of, by occupation	40
„ ship	41
Abandonment of property	41
Accession as a means of acquiring ownership	43
„ is natural or artificial	43
„ by the increase of animals	43
„ by alluvion	44
„ by the formation of islands in rivers	45
„ by <i>specificatio</i>	46
„ by building	48
„ by planting and sowing	50
„ by writing and painting	50
„ by <i>adjunctio</i>	52
„ by perception of fruits	53
„ , compensation to be made for loss of property by	55
Actions, personal, are movable property	5
„ , real, are movable or immovable property	5
„ <i>in rem</i>	13
„ of division	139
<i>Adjunctio</i>	52
Alienation, right of, is essential to ownership	34
Alluvion	44
Animals, capture of wild	37
„ , increase of	43
Antenuptial contracts may be set aside in some cases of insolvency	81
<i>Apprehensio</i>	20
Arrest of goods in execution establishes a judicial mortgage	251
„ „ to found jurisdiction gives no preference	252

B.

Banks, effect of deposits of money in, on the ownership in the money deposited	287
Bees, ownership in	38

	PAGE
Bottomry bonds	249
Boundary. <i>See</i> "Common Boundary."	
Bridle-road, servitude of	188
Building as a mode of acquiring ownership	48

C.

Capture of wild animals	37
" of enemy's property in war	42
Cattle-road, servitude of	188
<i>Causa</i>	67
Cession of mortgage bond	249
" " " , effect of	281
Children have a legal mortgage over the property of a surviving parent	255
Claimholders, perpetual or hereditary usufruct of	156
" have no ownership in diamonds not actually found by them	156
" , rights of, must be registered with the Registrar of Claims	157
" , rights of, as regards lateral support	103
" , duties of, to work down their claims	103
" , rights of, as regards drainage	135
Claims, registration of	157
" , transfer and hypothecation of	157
Commixture as a mode of acquiring ownership	47
Common boundary, ownership in trees growing on	50, 102
" " , right of landowner to lop off branches of trees overhanging from neighbouring property and enjoy the fruits of the same	101
Common furrow	207
Common wall, hedge, fence, or ditch	144, 186
" " is a compound of ownership and servitude	184
" " , rights of neighbours with respect to	185
Commonage. <i>See</i> " <i>Servitus pascui sive pecoris pascendi</i> ."	
<i>Communi dividundo</i>	139
Community of property by marriage	81
Compensation in case of building, planting, or sowing on another's land	55
" , lessee entitled to, for improvements made with the lessor's consent	59
Confiscation of property abolished	37, 60
" in the case of game birds' eggs, fishing nets, etc.	39
Confusion as a mode of acquiring ownership	47
<i>Constitutum possessorium</i>	23, 29
" " is not readily presumed	24
Contract of mortgage	237
" " is either express or tacit	240

	PAGE
Conveyancer	74
Copyright, Note 99	1
Covering Bond	246
<i>Creditores Massæ</i>	286, 289
Creditors, ranking of	285
„ are privileged, mortgage or concurrent	290

D.

Dedication to the public	199
Delivery, definition of the term	21
„ , how effected	21
„ made by a person who is not the owner is void	62
„ , in purchase and sale, an intention to transfer the ownership is not to be readily presumed from	66
„ is essential to the transfer of ownership in movables	70
„ to be valid must be <i>bonâ fide</i>	71
Deposits in banks, effect of, on the ownership in the money deposited	287
Disposition, right of	33
Divisional Councils have no tacit hypothecation for rates due	254
„ „ may prevent transfer of landed property until rates paid	254
Divisional roads	195
Doctors have a preferent claim for their fees for the last illness of a deceased person	290
<i>Dominium</i>	33
Drainage rights	129
„ , action for interference with natural	132
„ , rights of, as between mineowners and claimholders	135
„ , servitudes with respect to	209

E.

Encroachment by building	49, 101, 219
<i>Erf-grondbrief</i>	147, 148
Estoppel in cases of encroachment by building	49, 101, 219
Execution, effect of sale in, on ownership of property sold	287
„ „ , on mortgages	308
„ against immovable property, how obtained	309
Expropriation	60

F.

Fideicommissary has a <i>jus in rem</i>	35
<i>Fideicommissum</i> , in whom the ownership is vested in the case of a	35
Fiduciary has a <i>jus in rem</i>	35
Firewood, servitude of right to cut	202
Fish, protection of	38

	PAGE
Fishing, rules as to whale-	39
Flotsam	41
<i>Flumen</i> , explanation of the term, with reference to the <i>servitus fluminis</i>	180
<i>Fluminis servitus</i>	130, 180, 181
Footpath, servitude of	188
Freehold tenure	147
Fruits are natural, industrial or civil	53
,, belong to the owner of the soil as long as they are not severed from it	53
,, , a <i>malâ fide</i> possessor does not become the owner of, by gathering them	54
,, , what included under the term	161
,, the term, is restricted to the net profits after payment of the expenses	164
Funeral expenses are a preferent claim upon the estate of a deceased person	290
Fungibles, definition of the term	6
Future advances, mortgage bond to cover	246

G.

Game, protection of	38
General bond, execution of	245
,, , time of registration of	248
,, , effect of	280
General clause, insertion of, in special mortgage bond almost invariable	246
,, , attorney entitled to insert, under a power to pass a special bond	246
General plan, effect of the exhibition of a, at a public sale of ground in lots	193
Government, the legal mortgage of, for taxes	253
Guardians who have not taken out letters of confirmation are merely pro-tutors	257

H.

<i>Habitatio</i>	172
Harbour Boards have a statutory lien for all dock and harbour dues	263
Hunting, the laws of	39
<i>Huur gaat voor koop</i>	6

I.

Immemorial usage, effect of, to convert a private into a public stream	116
,, , effect of, to confer on an artificial channel or water-course the characteristics of a natural depression of watercourse	108, 130

	PAGE
Immemorial usage, effect of, to convert a reciprocal servitude of right of way into a public road	198
„ „ , as a mode of acquiring rights in favour of the public	220
<i>Immissio damni infecti causâ</i>	250
„ <i>legatorum servandorum causâ</i>	250
Immovable property, transfer of, must be effected according to the <i>lex rei sitæ</i>	73
„ „ may not be mortgaged by executors without the leave of the Court	245
„ „ of minors may not be mortgaged by guardians without the leave of the Court	245
„ „ must be declared specially executable	309
„ „ , rights to, are regulated by the <i>lex loci rei sitæ</i>	2
<i>Inædificatio</i>	48
Inheritance, as a mode of universal acquisition of property, has ceased	36, 82
Insolvent estate, trustee of, entitled to have the realization of mortgaged or pledged property	310
Interdicts, ordinary penal	26
„ , possessory	26
„ , <i>uti possidetis, utrobi</i> and <i>unde vi</i>	26
„ to restrain nuisances	78
Interest, rules as to preference for	300
Islands formed in rivers, ownership in	45

J.

Jetsam	41
Joint owners, rights of	136
„ , when they must all join in actions with reference to the joint property	143
<i>Jura in rem</i>	13

K.

<i>Kinderbewys</i> , deed of	256
„ is a privileged mortgage as long as the legal hypothec of the children survives	292
<i>Kustingbrief</i> , definition of the term	291
„ is a privileged mortgage	291

L.

Lagan	41
Land, ownership in, based on an original grant from the Crown	73, 92
„ belonging to private persons is all registered in the office of the Registrar of Deeds	73
„ tenure in the Colony is either perpetual quitrent or freehold	73

	PAGE
Landed property is either urban or rural	7
Landlord's lien	265
" " , effect of	274
" " , how enforced	274
Landowner, rights of	94
" may not create a nuisance on his land	94
" , right of, to build on his ground is unlimited as to height	99
" is not allowed to encroach on his neighbour's land	100
" may lop off branches overhanging from his neighbour's ground	101
" , right of, to dig on his own ground is unlimited as to depth	102
" , right of, to rain, surface, or flood waters	105
" , right of, as regards underground water	106
" , rights of, as to water rising on his own ground	112, 116
" , rights of, to water of public stream	118
Land tenure in the Colony is either freehold or perpetual quitrent	145
Lateral support	103
" " does not apply as between claimholders in mines	104
Lease of land is movable property, but confers a <i>jus in rem</i>	6
Legal mortgage	249
" " , modern legislation is opposed to	252
" " , questions as to, by what law to be decided	253
" " is either general or special	253
" " , instances of general	253
" " of Government	253
" " of wife over husband's estate	255
" " of minors on estates of guardians	256
" " of legatees and fideicommissaries	258, 289
" " , instances of special	260
" " of persons in possession of property for expenses incurred or labour expended	260
" " of lessor of land over <i>invecta et illata</i>	265
" " , instances of, which have been abolished	269
" " , effect of general	277
" " . See also "Right of retention."	
<i>Legplek</i>	147
Lessee retains, until the expiration of the lease, the ownership in materials affixed to the soil without the owner's consent	49
" is not a possessor in strict law	15, 58
" is not entitled to a right of retention, but has a tacit hypothec for compensation for improvements	59, 262
" is entitled to compensation for improvements made with the lessor's consent	59
" is not entitled to compensation for improvements made without the lessor's consent	59
" is entitled to necessary expenses	59
" may remove materials in the case of useful expenses	59

	PAGE
Lessors of immovable property have a legal mortgage or lien for <i>invecta et illata</i>	265
Lien, effect of a	272
, harbour boards have a statutory, for dock and harbour dues ..	263
, of attorneys and conveyancers	263
, attorney's	264
, landlord's	265
, maritime, of seamen and masters of ships	268
, maritime of salvors	268
<i>Litis contestatio</i>	54
Loan freeholds	146
, leases	146
Lost property remains the property of the owner	41

M.

Main roads	195
<i>Maintenue</i>	26
Mandament of <i>complainte</i> , <i>maintenue</i> and <i>spolis</i>	26
Maritime lien of seamen and masters of ships	268
, of salvors	268
Market overt, sale of stolen property in	65, 286
Medical men have a preferent claim for their fees for the last illness of a deceased person	290
Metals, ownership in	42
Minerals, ownership in precious	42
Mines, right to lateral support does not obtain as between claim- holders in	103
, drainage rights in	135
Minors have tacit hypothec on the estates of guardians	256
. See also "Guardians" and "Guardianship."	
<i>Missio in possessionem</i>	250
<i>rei servandæ causâ</i>	250
<i>ventris in possessionem</i>	250
Mixture or confusion as a mode of acquiring ownership	47
<i>Mobilia non habent sequelam</i>	306
Mortgage, definition of the term	231
has its origin either in contract or in law	232
is either conventional or legal or judicial	232
is general or special	233
, special, what it covers	234
, essentials of	234
, property which may be the subject of	235
, the property of another cannot be mortgaged	235
of property belonging to the joint estate by the surviving husband	236
, the contract of	237
contracts are either express or tacit	240

	PAGE
Mortgage, conventional, is effected either by registration of the contract of mortgage or by the delivery of the movable property	240, 241
" , legal, requires no registration	240
" , constitution of conventional	241
" of movable property is effected either by delivery or by registration	242
" of a mortgage	248
" , cession of a, need not be made <i>coram lege loci</i>	249
" of mining claims	249
" of ships and their cargoes	249
" , judicial	250
" , all creditors who lodge claims within ten days rank <i>pari passu</i> with the holder of a	251
" , legal	252
" , consequences of	271
" is a real charge on the property mortgaged	271
" , when it takes effect	282
" is privileged or not privileged	290
" , general rules with respect to the preference of non-privileged	293
" , extinction of	296
" , general, when extinguished by alienation of the mortgaged property	307
" , how enforced	309
" is an indivisible right	311
" . See also "Pledge," "Legal Mortgage," "Mortgage bond," and "Mortgagee."	
" bond is movable property	5
" , is either general or special	244
" , execution and preparation of special	244
" , special, on immovable property of minors cannot be executed without leave of the Court	245
" , executors may not pass special, except with leave of the Court	245
" , general	245
" , for future advances	246
" , must be registered	247
" , must also be registered against surety	247
" , mode of registration of special	248
" , time of registration of general	248
" , cession of	248
" , effect of special	275
" , effect of general	280
" , effect of special, of movables without delivery	281
" , takes precedence according to its date of registration	294
" , rule as to preference for interest on	300
" , covers penalty and costs of recovery of the amount thereof	300

	PAGE
Mortgage bond may be set aside on the grounds of fraud, undue preference or gratuitous alienation	307
„ „ <i>See also</i> “General bond” and “Special bond on movables.”	
Mortgagee cannot, as a rule, realize the mortgaged property without an order of Court	309
„ cannot be compelled to split up his right of action ..	311
„ may proceed against any portion of the mortgaged property he pleases	312
„ may insist upon the mortgaged property being sold unencumbered	312
Movable property, right to, regulated by the law of the domicile of the owner	2
Municipalities have no tacit hypothecation for rates due	254

N.

Navigation, rights of, on public streams	12
Necessary expenses	59
Necessary way or way of necessity	191
Novation discharges the original debt	302
„ is not presumed except by way of necessary inference ..	302
Nuisance, what amounts to an actionable	95
„ , the Court may grant an interdict to restrain a	98
„ , prescription no defence to certain kinds of	99
„ , who liable for the commission of a	99

O.

Occupation as a mode of acquiring ownership	37
Occupier. <i>See</i> “Possessor.”	
<i>Opstal</i>	146
Ordinance 3 of 1844	251
<i>Ordonnantie</i>	146
Ostriches, ownership in domesticated	38
„ , protection of wild	38
Outspan, public	201
Ownership	13, 33
„ , definition of the term	33
„ , acquisition of	36
„ , loss of	60
„ , transfer of	61
„ , essentials of valid transfer of	61
„ , intention essential to transfer of	65
„ , <i>justa causa</i> essential to transfer of	67
„ , rights of	90
„ , actions arising out of	90
„ , in land is based on an original grant from the Crown ..	73, 92
„ , joint right of	136

	PAGE
Ownership, actions of division in cases of joint	139
" is presumed to be full and complete in absence of evidence to the contrary	151
" may be limited by <i>fideicommissum</i> , servitude or mortgage	151
P.	
Partition suit	139
Partner is not entitled to pledge partnership property for a debt of his own	237
Passage of Water Act	205
Patents, Note 1	1
Pawnbrokers can give valid title to stolen property pledged with them	64
Perpetual quitrent	145
" " , creation of	147
" " , transfer of	148
" " , rights of holder of	149
" " , Government reservations under	150
<i>Pignus judiciale</i>	250
<i>Pignus prætorium</i>	250
" " , effect of	272
" " , is extinguished by the insolvency of the debtor before the proceeds are paid over to the judgment creditor	308
Plan. See "General Plan."	
Pledge, how effected	242
" , continuous possession essential to the validity of	243
" , a purchaser of movable property with knowledge of a sub- sisting pledge has no greater right than the seller	244
" of the title-deeds of immovable property gives no right of pre- ference	245
" , effect of	272
<i>Possessio justa</i> and <i>possessio injusta</i>	17
Possession	13
" , definition of the term	14
" is civil or natural	17
" , no one may change the ground on title of his	18
" , is either <i>bonâ fide</i> or <i>malâ fide</i>	19
" , acquisition of	20
" , who incompetent to acquire	22
" , quasi-	25
" , effect of	25
" , loss of	29
" , renunciation or abandonment of	31
Possessor, <i>bonâ fide</i> , retains ownership in materials affixed by him to land and may remove the same	48
" " , acquires all fruits gathered by him before the <i>litis</i> <i>contestatio</i>	54

	PAGE
Possessor, <i>bonâ fide</i> , fruits may be set off against claim for improvements by	58
„ „ , is entitled to recover useful expenses	56
„ „ , has right of retention for useful expenses	56, 261
„ „ , may remove improvements	57
„ „ , loses his right to compensation if he allows property to be sold without giving notice of his claim	58
„ „ , <i>malâ fide</i> , may before demand remove materials affixed by him to the soil	49
„ „ , does not acquire the ownership of fruits gathered by him	54
„ „ , is entitled to useful expenses	56
„ „ , may remove improvements	57
„ „ , is in the position of a spoliator	57
„ „ , has no right of retention for improvements	57
„ „ , loses his right to compensation if he allows the property to be sold without giving notice of his claim	58
Possessory rights, remedies and interdicts	26
<i>Prædium rusticum</i> and <i>prædium urbanum</i>	7, 177
Precious stones, ownership in	42
Prescription, acquisition of ownership by	80, 82
„ „ , rationale of	83
„ „ , <i>longissimi temporis</i>	83
„ „ , period of	83
„ „ , applies to both movable and immovable property	93
„ „ , how period of, computed	84
„ „ , essentials of	85
„ „ , interruption of	85
„ „ , will run against private persons or public corporations	86
„ „ , will run against the public	87
„ „ , will run against the Crown	87, 219
„ „ , does not run against minors or persons under curatorship	88
„ „ , when completed will give the right to demand a registered title	89
„ „ , right by, may be lost by a sale without notice	89
„ „ , of servitudes	215
„ „ , extinction of mortgage by	298, 303
Produce, what included under the term	161
Property is public or private	10
„ „ , is urban or rural	7, 177
Public outspan	203
Public roads. <i>See</i> “Roads.”	
Public streams. <i>See</i> “Streams.”	
Purchase and sale, intention to transfer ownership not necessarily presumed from delivery in the case of	66

	PAGE
Purchaser with knowledge of a subsisting pledge has no greater right than the seller	244, 307
Q.	
Quarrying stone, servitude of right of	202
Quitrent. <i>See</i> "Perpetual quitrent."	
R.	
Ranking of creditors	285
Real rights	13
Rebel is in the same position as a foreign enemy as regards capture of his property	43
<i>Recognitio</i>	146
Registration of mortgage bonds essential to their validity	240, 241, 247
<i>Renascentia</i>	164
<i>Res</i>	1
<i>nullius</i>	8
" " , acquisition of, by occupation	37
<i>alicujus</i>	8
<i>extra commercium</i>	8
<i>communis</i>	9
<i>divini juris</i>	10
<i>sacrae, religiosae, and sanctae</i>	10
Respondentia bonds	249
Retention. <i>See</i> "Right of retention."	
Right of retention of possessor for expenses incurred	57, 261
" " of builders	260
" " of lessees of land not entitled to	262
" " , effect of	272
" " amounts to a privileged mortgage	292
Riparian land, meaning of the term	118
" " may be deprived of its riparian character by the terms of its original grant	119
Riparian proprietors, rights of, to the water of a public stream	119
" " may not use their share of the water on non-riparian land	125
" " , rights of, as to banks of public streams	129
Rivers. <i>See</i> "Streams."	
Rural and urban tenements	7
Roads, loss of public, by prescription	87
" , public, what they are	194
" " , are either proclaimed or unproclaimed	194
" , main and divisional	195
" , width of public, defined by divisional councils	196
" , neighbours'	196
" , rights to unproclaimed public, how acquired	198
" , dedication of, to the public	199

S.

	PAGE
Sale in execution. <i>See</i> "Execution."	
Salvors, maritime lien of	268
Sea is common to all	9
Sea-shore, definition of the term	9
" is common to all	9
" , the regulation of the use of, is vested in the Government ..	10
<i>Separatists</i>	288
Servitudes are a permanent derogation from the rights of ownership ..	34
" , what presumed in a grant of	92
" , natural, or servitudes of necessity	92, 102, 129, 190, 224
" , general principles of	151
" , definition of the term	151
" are either personal or prædial	154
" , personal	154
" " , whether movable or immovable property	5, 154
" , prædial, are unmovable property	5, 154
" , kinds of personal	155
" , some prædial, may by agreement be converted into personal ..	155
" . <i>See also</i> "Usufruct," "Usus," and "Habitatio."	
" , prædial, definition of the term	154, 173
" " , are limited to the actual requirements of the dominant tenement	174
" " , must offer some advantage to the dominant tenement	174
" " , include every right without which they cannot be properly enjoyed	176
" " , are indivisible in their nature	176
" " , are either affirmative or negative	176
" , negative, definition of	176
" cannot consist in the owner of the servient tenement being obliged to do anything	177
" are either urban or rural	177
" , urban	178
" , rural	187
" of footpath, bridle-road and cattle-road or trekpath	188
" of right of way	188
" of necessity	190
" of grazing or right of common	200
" of right of cutting firewood or quarrying stone	202
" of public outspan	203
" of water-leading	204
" with respect to drainage	209
" of drawing of water	209
" of watering cattle	211
" by nature	103, 129, 222
" , acquisition of	212

	PAGE
Servitudes, registration of	213
„ , prescription of	215
„ , adverse uses essential to the acquisition of negative, by prescription	216
„ , prescription of, will run against the Crown	219
„ , immemorial usage as a mode of acquisition of, by the public	220
„ , creation of, by municipal regulation	221
„ , registration of, by order of Court	221
„ , extinction of	223
„ , actions arising out of	229
<i>Servitus actus</i>	188
„ <i>altius tollendi</i>	182
„ <i>altius non tollendi</i>	181
„ <i>aquæductus</i>	204
„ <i>aquæhaustus</i>	209
„ <i>cloacæ</i>	181
„ <i>fluminis recipiendi</i>	181, 180
„ <i>fluminis non recipiendi</i>	181
„ <i>itineris</i>	188
„ <i>luminis aperiendi sive immittendi</i>	182
„ <i>luminis non aperiendi</i>	182
„ <i>luminis non officiendi</i>	182
„ <i>non prospiciendi</i>	183
„ <i>oneris ferendi</i>	178
„ <i>pascui sive pecoris pascendi</i>	200
„ <i>pecoris ad aquam appulsus</i>	210
„ <i>projiciendi</i>	179
„ <i>prospectus</i>	184
„ <i>stillicidii recipiendi</i>	180, 180
„ <i>stillicidii non recipiendi</i>	181
„ <i>tigni immittendi</i>	179
„ <i>vis</i>	188
<i>Sic utere tuo ut alienum non lædas</i>	33, 91, 106, 120, 127
Special bond on movables, execution of	246
„ „ „ , effect of	281
<i>Specificatio</i> as a mode of acquiring ownership	46
Spoliation, writ of	26, 27
<i>Spolie, mandament van</i>	26
<i>Stillicidium</i> , meaning of the term	179
Stolen property may be recovered by the owner from any possessor	63, 286
„ sale of, in market overt	65, 286
„ money, bank notes, &c. A thief may pass a valid title to ..	64
Streams are either public or private	11, 108
„ , private, what are	109
„ „ , belong to the owner of the land	11, 110, 118
„ , rights to water of public	9, 12, 110, 118
„ , riparian proprietors have common rights to public ..	12, 108, 119
„ , perennial, what are	109

T.

	PAGE
Tacit mortgage. See "Legal Mortgage."	
Things, the law of	1
" , definition of the term	1
" , classification of	1
" are movable or immovable	2
" , movable, are regarded as situate at the domicile of the owner	2
" , rights to immovable, regulated by the <i>lex loci rei sitæ</i> ..	3
" , rights to movable, regulated by the law of the domicile of the owner	2
" , immovable, what are	3
" , movable, what are	6
" are owned or unowned	8
" common	9
" public or private	10
Trade marks, Note 4	1
<i>Traditio</i>	69
" , <i>brevi manu</i>	22, 23
" , <i>longa manu</i>	21, 23
Transfer of ownership	61
" of immovable property	72
" essential to ownership in land	73, 77
" cannot be effected without previous grant from the Crown	73, 76
" must be registered in the office of the Registrar of Deeds ..	73
" , deeds of, by whom prepared	74
" , registration of, is a judicial act	83
" , where clean, full ownership passes	76
" , registration of, intended for protection of innocent parties ...	77
" , registration of, not essential as between the parties or their representatives	78
" , rectification of	78
" , cancellation of	78
" , acceptance not essential to the validity of	79
" , may be set aside in case of the insolvency of the transferor	79, 81
" , by order of Court	79
Treasure trove, definition of the term	42
" becomes the property of the finder wholly or in part ..	42
Trees planted near the common boundary	50, 101
Trekpath, servitude of	188
Trespass, action of	93
Trustee of an insolvent estate may claim to realize mortgaged or pledged property	310

U.

<i>Universitates rerum</i>	2
Urban and rural tenements	7, 177
Useful expenses, what are	56

	PAGE
<i>Usucaption</i> no longer known amongst us	83
<i>Usufruct</i>	33, 156
" , hereditary, with respect to claims	156
" , definition of the term	158
" , how constituted	159
" , legal effect of	159
" of land, what it includes	161
" , what fruits usufructuary entitled to	161
" , rights of usufructuary as regards minerals and metals	163
" , usufructuary may not sell or encumber the property itself	165
" , duties of the usufructuary	165
" , usufructuary entitled to an action <i>in rem</i>	168
" , extinction of	168
<i>Usurpatio</i>	85
<i>Usus</i>	170

V.

<i>Via vicinalis</i>	196
<i>Vindicantes</i>	286
<i>Vindicatio rei</i>	90

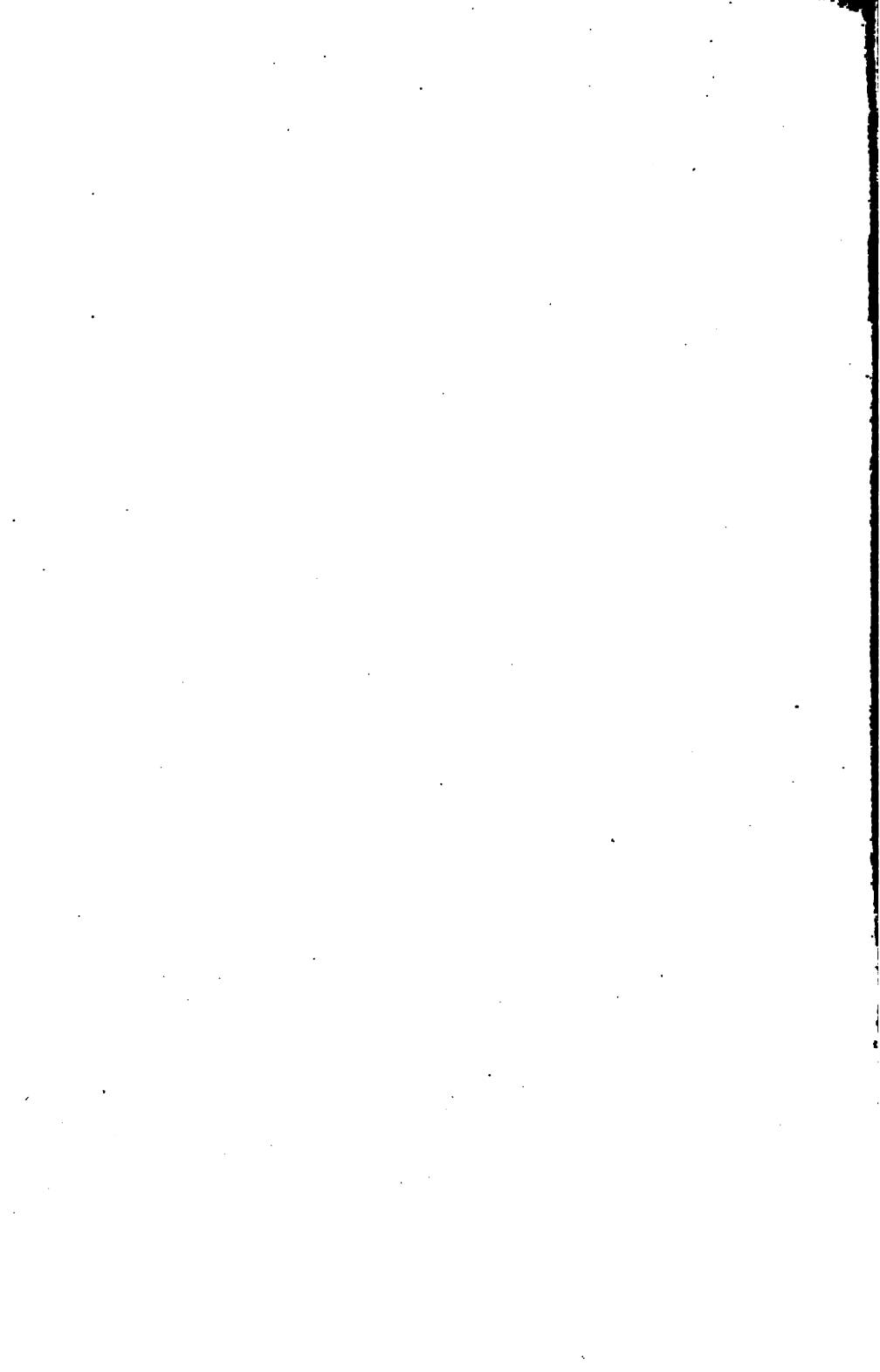
W.

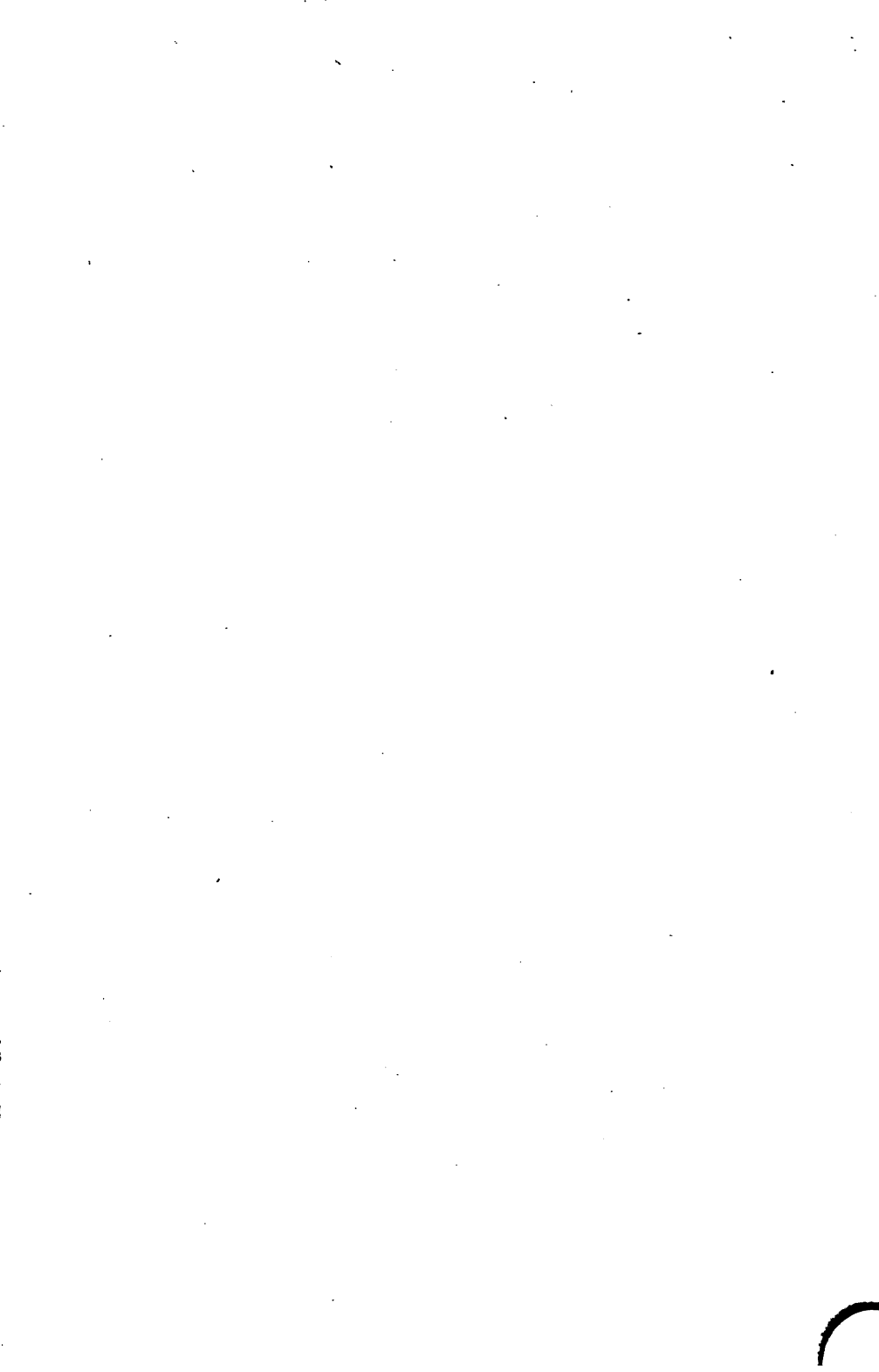
Water, rights of landowner to rain, surface of flood	105
" " " to underground	108
" rights	105
" " of riparian proprietors	120
" , flowing, classed amongst things common	119
" , primary or secondary, ordinary or extraordinary uses of	121
" . Passage of, Act	205
Water-leading, servitude of	204
Way, right of	188
" of necessity	93, 191
Well, right of landowner to intercept underground water supplying neighbour's	107
Whale-fishing, laws of	40
Wife has a legal mortgage over the husband's estate under certain circumstances	255
Wreck, definition of the term	41
" , ownership in	41

END OF BOOK II.

LONDON:

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.





Standard Law Library



3 6105 063 305 424

EFFE 320